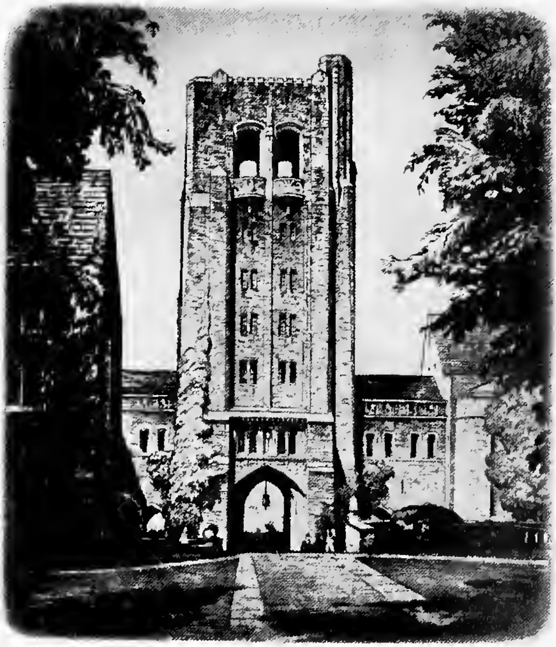

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THE LAW

OF

LIFE INSURANCE,

INCLUDING

ACCIDENT INSURANCE

AND

INSURANCE BY MUTUAL BENEFIT SOCIETIES.

BY

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NEW YORK:
BAKER, VOORHIS & CO., PUBLISHERS,
66 NASSAU STREET.

1891.

Press of Willis McDonald & Co.
39-43 Gold St., N. Y.

PREFACE.

It is about seventeen years since the publication of the last comprehensive American treatise devoted to the law of Life Insurance. This was the work of BLISS, the second and last edition of which appeared in 1874. The work of MAY, a new edition of which recently appeared, covers the subjects of fire and guarantee insurance, and almost necessarily gives a secondary and subordinate place to the important subject of Life Insurance. The works of BACON and NIBLACK, published in 1888, are confined to insurance by mutual benefit societies. The work of ALEXANDER, published in 1887, is professedly confined to the law of a single State (New York).

Hence there seems to be ample justification for the publication at this time, of a comprehensive treatise on the law of Life Insurance, especially in view of the extremely rapid recent development of the law on this subject, particularly in its application to mutual benefit societies.

What is true of the reported decisions generally,—that their number is not only enormous, but increasing with an appalling rapidity,—is, or is becoming, true of the decisions affecting the law of Life Insurance This circumstance tends to make more and more imperatively necessary, clear and correct statements of general and fundamental principles, such as shall serve as a guide and a clue amid the chaos of decisions that are so often obscure, as well as contradictory. This growing need I have endeavored to meet by an appropriate separation of the functions of *text* and *notes*. For the text, I have, as a rule, reserved the statement and exposition of general and fundamental principles, while in the notes are contained cases supporting and illustrating these principles, besides statements of mere exceptions to, and limitations upon, their operation.

The law as it affects mutual benefit societies, is herein considered as fully as is the law affecting the "old-line" companies. But, generally

speaking, the same rules of law apply to both, with an occasional divergence as to the application of such rules, principally with respect to the manner and effect of making *assessments*, as distinguished from *premiums*. Such divergences are fully stated, each in its proper connection.

The conciseness of the work may provoke criticism and excite suspicion that matter of importance has been omitted. But the author is confident that the work is more than ordinarily free from the fault of such omission. Not only the American decisions, both State and Federal, have been exhaustively examined, but also the English, Scotch, Irish and Canadian decisions. By avoiding the insertion of long extracts from opinions, and prolix statements of inconsequential facts, the amount of matter has been brought within a comparatively small compass, but it is believed that no existing rule of law bearing on the subject has been overlooked, either as to its statement, or as to its application to particular cases.

FREDERICK H. COOKE.

EQUITABLE BUILDING,
120 Broadway, New York City.
May, 1891.

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[This table comprises a list of the cases arranged alphabetically according to the names of *defendants*, in addition to the ordinary list of cases arranged alphabetically according to the names of *plaintiffs*. Whether or not such double arrangement is an advisable one to adopt for law treatises generally, it is believed to be advisable here. Not to speak of the additional security thus furnished against the effect of errors in citation, a justification is found in the peculiar nature of insurance law, consisting largely, as it does, of decisions in which the name of some one of a comparatively few companies appears, either as plaintiff or defendant (more frequently the latter). By the arrangement proposed, all the cases in which a given company appears either as plaintiff or as defendant, will, generally speaking, be grouped together.

The convenience of such an arrangement, especially in case of a company that has inserted in its contracts some peculiar provision that has become the source of litigation, will be readily apparent.

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[Here are included references to cases that were reported, or became accessible, too late for insertion in their proper places in the body of the work. In connection with each such reference is indicated the place in the body of the work where the corresponding matter may be found.]

CHAPTER I.

§ 4. As to novation of contract by assumption of risk by new benefit society, see Burns *v.* Grand Lodge A. O. U. W., 26 Northeastern Rep. 443 (Supm. Ct. Mass. 1891).

§ 8. A mutual benefit company, in so far as it engages in the business of life insurance, is a life insurance company. Chartrand *v.* Brace, 26 Pacific Rep. 152 (Supm. Ct. Colo. 1891).

§ 8 (note 1, p. 12). Judgment of expulsion from benefit society, held illegal, where the member was insane at the time. Hoeffner *v.* Grand Lodge German Order Harugari, 41 Mo. App. 359 (1890). Here the court distinguish Pfeiffer *v.* Weishaupt, 13 Daly, 161, on the ground that by the law of New York a judgment may be recovered against an insane person, without suing him by committee, while in Missouri an insane person must defend by guardian.

§ 8 (note, p. 13). As to evidence of restoration to membership after suspension, see Supreme Council Catholic Knights of America *v.* Connema, 3 Ohio Circuit, 130 (1888).

§ 9. As to effect of Wisconsin statute prescribing who shall be held to be agents of an insurance company, see Mathers *v.* Union Mutual Accident Assoc., 11 Lawyers' Rep. 83 (Supm. Ct. Wis. 1891).

CHAPTER II.

§ 11 (p. 18). In Mathers *v.* Union Mutual Accident Assoc., 11 Lawyers' Rep. 83 (Supm. Ct. Wis. 1891), an *oral* contract of insurance was held binding, though, *after* the transactions relied on as constituting such oral contract, the applicant signed *a written application*, wherein he agreed that the liability of the insurer should not commence prior to the receipt and acceptance of the application. This decision is hard to reconcile with fundamental legal principles.

§ 13 (note 1, p. 22). That a policy supersedes the application, see Hunter *v.* Scott, 12 Southeastern Rep. 1027 (Supm. Ct. N. C. 1891).

§ 19. A false statement as to a material matter, though made in good faith, avoids the contract. Sullivan *v.* Metropolitan Co., 12 N. Y. Suppl. 923 (1891).

§ 20. Knowledge on part of agent of insurer, of falsity of statement made by applicant, will not relieve from forfeiture. Sullivan *v.* Metropolitan Co., 12 N. Y. Suppl. 923 (1891).

§ 21. In Michigan Mutual Co. *v.* Reed, 47 Northwestern Rep. 1106 (Supm. Ct. Mich. 1891), was declared the right of insured to rescind the contract, on discovering that statements were inserted in the application, by agent of insurer, at variance with those furnished by applicant. See § 133 (Addenda), below.

§ 21 (note 2, p. 38). The prevailing doctrine herein stated, is further supported by Wright *v.* Northwestern Mutual Co., 15 Southwestern Rep. 242 (Ct. of App. of Ky. 1891 ; where the rule was distinctly held to apply to "soliciting agents") ; Germania Co. *v.* Lunkheimer, 26 Northeastern Rep. 1082 (Supm. Ct. Ind. 1891).

§ 23 (note 2, p. 41). See subsequent decision in Fowler *v.* Metropolitan Co., in 13 N. Y. Suppl. 755 (1891).

CHAPTER III.

§ 27. As to evidence concerning alleged misstatements as to health, see Bancroft *v.* Home Benefit Assoc., 12 N. Y. Suppl. 718 (1891).

§ 36 (note 1, p. 60). Under provision avoiding the contract should insured "become so far intemperate as to impair his health, or induce *delirium tremens*," held error to charge that, to avoid the contract, the impaired health or *delirium tremens* must be the result of a *habit* of insured to use intoxicating liquor to excess. Conn. Mutual Co. *v.* Attee, 3 Ohio Circuit, 650 (1889).

§ 38. As to statements that occupation of insured was that of "oil producer," and his duties "supervising," see Cram *v.* Equitable Assoc., 11 N. Y. Suppl. 462 (1890).

§ 44. As to evidence that death was caused by suicide, see Goldschmidt *v.* Mutual Co., 12 N. Y. Suppl. 866 (1891).

§ 51 (note 2, p. 82). As to exception of injury happening from "voluntary exposure to unnecessary danger," see Duncan *v.* Preferred Mutual Accident Assoc., 13 N. Y. Suppl. 620 (1891; crossing railroad track).

§ 51 (note 2, p. 83). "*Standing or walking* on the road-bed or bridge of any railway," held not to apply to merely crossing. Duncan *v.* Preferred Mutual Accident Assoc., 13 N. Y. Suppl. 620 (1891).

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§ 58 (note 1, p. 92). The doctrine of the necessity of an insurable interest, was declared in Burbage *v.* Windley, 12 Southeastern Rep. 839 (Supm. Ct. N. C. 1891).

§ 60. A person may insure his own life, making payee one without insurable interest. Goldbaum *v.* Blum, 15 Southwestern Rep. 564 (Supm. Ct. Tex. 1891).

§ 62 (note 2, p. 100). The decision in Waldheim *v.* John Hancock Co., 13 N. Y. Suppl. 577 (1891), seems inconsistent with the rule laid down in Olmsted *v.* Keyes.

§ 63. A creditor has an insurable interest in his debtor's life. Walker *v.* Larkin, 26 Northeastern Rep. 684 (Supm. Ct. Ind. 1891).

§ 65 (note 2, p. 105). With Palmer *v.* Welch, see Parke *v.* Welch, 33 Ill. App. 188 (1889), which Palmer *v.* Welch affirms.

§ 65 (note 2, p. 105). The insurer held precluded from asserting invalidity of designation made in contravention of rights of original beneficiary, such designation being assented to by such beneficiary. Aiken *v.* Mass. Benefit Assoc., 13 N. Y. Suppl. 579 (1890).

§ 65 (note 2, p. 106). The rule in Knights of Honor *v.* Watson, 64 N. H. 517, by which the insurer was allowed to waive the invalidity of a designation, was much limited in Parke *v.* Welch, 33 Ill. App. 188 (1889). It was conceded that it might apply to a case where the fund would lapse, in case of the beneficiary designated being held not entitled to it; but it was held not to apply to a case where, treating the designation as a nullity, payment may nevertheless be made to others, as if no designation had been made. This decision was affirmed in Palmer *v.* Welch, 23 Northeastern Rep. 412 (Supm. Ct. Ill. 1890).

§ 65 (note 3, p. 106). In the absence of a valid designation, the proceeds were disposed of as if no designation had been made. Parke *v.* Welch (see above); Burns *v.* Grand Lodge A. O. U. W., 26 Northeastern Rep. 443 (Supm. Ct. Mass. 1891); Arthars *v.* Baird, 8 Pa. Co. 67 (1890).

§ 66 (note 1, p. 107). A woman engaged to marry the insured, held not a "dependent." Parke *v.* Welch (see above); McCarthy *v.* New England Order of Protection, 26 Northeastern Rep. 866 (Supm. Ct. Mass. 1891). Yet, where she was actually supported in part by him,

she was, under the circumstances, held a "dependent," though he was under no *legal* obligation to support her. McCarthy *v.* New England Order of Protection, above.

§ 67 (note 1, p. 110). The term "heirs" held to indicate the persons designated by the statute as such in case of intestacy. Young Men's Mutual Assoc. *v.* Pollard, 3 Ohio Circuit, 577 (1888). Here the widow was held entitled as "heir," on the ground that she was by statute entitled to a share in the personal estate of her husband, if dying intestate. And the heirs (consisting of such widow and a child) were held entitled to share, not equally, but in the proportions fixed by the statutes of distribution, in case where one dies intestate, leaving a widow and a child or children.

§ 68 (note 1, p. 111). Grandchild held not entitled as "child." Lane *v.* De Mets, 13 N. Y. Suppl. 347 (1891).

§ 70 (note 1, p. 114). Declarations of insured (in benefit society) held admissible against beneficiary, on ground that insured had by statute right to change beneficiary. Steinhausen *v.* Preferred Mutual Accident Assoc., 13 N. Y. Suppl. 36 (1891). (Following Smith *v.* National Benefit Soc.)

§ 71. An assignment of *part of* the claim on the contract, is valid and enforcible. Cushman *v.* Family Fund Soc., 13 N. Y. Suppl. 428 (1891).

§ 71 (note, p. 116). As to avoiding assignment on ground of duress, see Walker *v.* Larkin, 26 Northeastern Rep. 684 (Supm. Ct. Ind. 1891).

§ 71 (note 1, p. 118). As to necessity of giving insurer notice of assignment of the contract, see Matter of Young, 25 L. R. (Irish), 372 (1890).

§ 72 (note, p. 119). As to showing assignment, absolute on its face, to have been given simply as security, see Cushman *v.* Family Fund Soc., 13 N. Y. Suppl. 428 (1891).

§ 75 (note 1, p. 127). The right to change the beneficiary named in a benefit certificate, was declared in Schmidt *v.* Iowa Knights of Pythias, 47 Northwestern Rep. 1032 (Supm. Ct. Iowa, 1891), on the authority of Brown *v.* Grand Lodge A. O. U. W.; Hirschl *v.* Clark (see p. 130). And see Schmidt *v.* Iowa Knights of Pythias, as to evidence of change of beneficiary.

§ 75 (note 1, p. 128). In Steinhausen *v.* Preferred Mutual Accident Assoc., 13 N. Y. Suppl. 36 (1891), it seems to have been thought that there is an *inherent* difference between mutual benefit societies and ordinary insurance companies, as to the right to change the beneficiary. The right to change the beneficary in that case was, however, expressly given by statute.

§ 75 (note 2, p. 129). Where it was provided that the insured might change the beneficiary, but also that, to entitle him to make such change, *the written consent of the original beneficiary* must be presented, it was held that, as between the insurer and the insured, such change might be made without such consent. Supreme Council Catholic Knights of America *v.* Franke, 27 Northeastern Rep. 86 (Supm. Ct. Ill. 1891). But this is clearly contrary to the rules established by the weight of authority.

§ 75 (note 2, p. 130). Attempted change of beneficiary by will, held invalid. McCarthy *v.* New England Order of Protection, 26 Northeastern Rep. 866 (Supm. Ct. Mass. 1891); Scott *v.* Scott, 20 Ontario Rep. 313 (1890).

§ 76 (note 1, p. 131). Under provision in benefit certificate that the insurance money should, "*at the death*" of the insured, "be paid to his wife E, and *in case of her death*, to M, C and A, his children," the death of the wife *after* his death, was held not to entitle the children to the money, but the money was held to pass to her administrator as part of her estate. Chartrand *v.* Brace, 26 Pacific Rep. 152 (Supm. Ct. Colo. 1891).

§ 76 (note 1, p. 132). In Rothweiler *v.* Ryan, 4 Ohio Circuit, 338 (1890), the insured was held to have the right of disposition of the proceeds of the contract, on the death of all the original beneficiaries.

§ 76 (note 1, p. 133). Where, by the contract, the right was reserved to change the beneficiary, the representatives of the original beneficiary were held not entitled, though the insured had made no attempt to change the original designation. Arthars *v.* Baird, 8 Pa. Co. 67 (1890).

§ 77 (note 1, p. 136). Voluntary transfer by insured while insolvent, to his wife and daughter, of policy originally taken out for his own benefit, held fraudulent as to his creditors. Ionia County Bank *v.* McLean, 48 Northwestern Rep. 159 (Supm. Ct. Mich. 1891). So held, notwithstanding statutory provisions for the protection of the rights of beneficiaries.

§ 78 (p. 137). The statutory provisions for the protection of rights of the beneficiary, are in the nature of exemption laws, and to be liberally construed. Wanschaff *v.* Masonic Mutual Soc., 41 Mo. App. 206, 211 (1890).

As to North Carolina constitutional provision, see Burwell *v.* Snow, 107 N. C. 82 (1890). As to Ohio statute, see Weber *v.* Paxton, 26 Northeastern Rep. 1051 (Supm. Ct. Ohio, 1891; policy taken out by wife on husband's life).

§ 78 (p. 138). Assignment by the wife alone *after the death* of the husband, held, under the Missouri statute, invalid as to the interest of her children, who were also beneficiaries, and also held invalid as to her own interest, on the ground that it was procured by fraud and undue influence. Wanschaff *v.* Masonic Mutual Soc., 41 Mo. App. 206 (1890).

§ 78 (p. 139). The rights of a member of a benefit society, held not controlled by the N. Y. statutory provisions for the protection of rights of the beneficiary. Steinhausen *v.* Preferred Mutual Accident Assoc., 13 N. Y. Suppl. 36 (1891). (Following Durian *v.* Central Verein).

§ 81. As to rights of creditors of husband under Ohio statute, in case of premiums paid by him on policy taken out by his wife on his life, see Weber *v.* Paxton, 26 Northeastern Rep. 1051 (Supm. Ct. Ohio, 1891).

CHAPTER V.

§ 83 (note 3, p. 148). As to evidence of regularity of assessment, see Backdahl *v.* Grand Lodge A. O. U. W., 48 Northwestern Rep. 454 (Supm. Ct. Minn. 1891).

§ 84 (note 1, p. 151). Equitable relief granted against surrender of a policy for paid-up policy, made in mutual ignorance of fact of death of insured. Reigel *v.* American Co., 21 Atlantic Rep. 392 (Supm. Ct. Pa. 1891), reversing 7 Pa. Co. 445.

§ 84 (note 1, p. 152). Montgomery *v.* Phœnix Mutual Co., must be regarded as overruled by Hexter *v.* N. Y. Co., 15 Southwestern Rep. 863 (Ct. of App. of Ky. 1891), in so far as it holds that, under an agreement to issue a paid-up policy, provided surrender of the original policy is made within a specified time, the right is not lost by failure to make such surrender within such time, time not being of the essence of the contract. It is, however, distinguished in Hexter *v.* N. Y. Co., on the ground that, besides the provision for the paid-up policy, there was a provision that, even in case of non-payment of premiums, the contract would continue in force for a proportionate part.

§ 85 (note 1, p. 155). As to effect of statute of limitations on claim for reimbursement for premiums, see Walker *v.* Larkin, 26 Northeastern Rep. 684 (Supm. Ct. Ind. 1891).

§ 88. In Mutual Reserve Fund Assoc. *v.* Hamlin, 11 Supm. Ct. Rep. 614 (Supm. Ct. U. S. 1891), the provisions of the contract were held such that the insured was entitled to notice.

§ 88 (note 1, p. 162). Notice of assessment held insufficient to produce a forfeiture. Taggart *v.* Phœnix Mutual Assoc., 8 Pa. Co. 334 (1890).

Under provision that notice of assessment should be delivered to the member "*or deposited in the mails*, directed to the member at his last or usual place of residence or business," notice so directed and deposited in the mail, held sufficient, whether received by the member or not. Forse *v.* Supreme Lodge Knights of Honor, 41 Mo. App. 106 (1890). See also, as to sufficiency of notice of assessment, Backdahl *v.* Grand Lodge A. O. U. W., 48 Northwestern Rep. 454 (Supm. Ct. Minn. 1891).

§ 90 (note 3, p. 164). As to effect of payment of premium by giving order on third person, see Pacific Mutual Co. *v.* Williams, 15 Southwestern Rep. 478 (Supm. Ct. Tex. 1891).

§ 90 (note 1, p. 165). As to effect of provision for payment of premium by note, see McEvoy *v.* Michigan Mutual Co., 3 Ohio Circuit, 569 (1889).

As to recovery on premium note, see Marskey *v.* Turner, 81 Mich. 62 (1890).

Held defense to action on premium note, that statements had been inserted in the application by the agent of the insurer, at variance with those furnished by applicant. Michigan Mutual Co. *v.* Reed, 47 Northwestern Rep. 1106 (Supm. Ct. Mich. 1891). This is contrary to dictum in Plympton *v.* Dunn, 148 Mass. 523 (1889).

§ 94 (note 3, p. 174). Contract held forfeited for non-payment of premium at time agreed. Hexter *v.* U. S. Co., 15 Southwestern Rep. 863 (Ct. of App. of Ky. 1891).

§ 99 (note, p. 182). With Scheufler *v.* Grand Lodge A. O. U. W., compare Backdahl *v.* Grand Lodge A. O. U. W., 48 Northwestern Rep. 454 (Supm. Ct. Minn. 1891).

§ 99 (note 2, p. 182). See McEvoy *v.* Michigan Mutual Co., 3 Ohio Circuit, 569 (1889).

§ 99 (note 1, p. 184). See subsequent decision in Fowler *v.* Metropolitan Co., in 13 N. Y. Suppl. 755 (1891).

§ 99 (note 2, p. 184). In Michigan Mutual Co. *v.* Custer, 27 Northeastern Rep. 124 (Supm. Ct. Ind. 1891), agreement for extension of time of payment (of premium note), sustained as waiver sufficiently supported by consideration, such agreement having been entered into *before* the note became due.

CHAPTER VI.

§ 110 (note 4, p 201). Right to maintain proceeding for accounting for plaintiff's share of profits, denied on ground that plaintiff was bound to acquiesce in the discretion of the directors as to the amount of the profits thus divisible among the persons insured, and as to the amount of such profits that should be retained to secure the future stability of the company. Bain *v.* Ætna Co., 20 Ontario Rep. 6 (1890).

§ 112. Provisions in the constitution, by-laws and regulations of the society, for the determination of disputed questions by a tribunal of the society, held applicable only to disputes between the society and a member, and not to apply to a dispute between the society and a beneficiary who was not a member. Strasser *v.* Staats, 13 N. Y. Suppl. 167 (1891).

§ 112 (note 2, p. 204). Member of benefit society held bound to exhaust remedy provided, for resorting to tribunal of the society, before resorting to the courts. Schryver *v.* Columbia Lodge I. O. O. F., 3 Ohio Circuit, 422 (1888; sick benefits).

§ 121 (note 2, p. 222). The doctrine of insurable interest does not preclude a person from receiving the insurance money merely as appointee. Pacific Mutual Co. *v.* Williams, 15 Southwestern Rep. 478 (Supm. Ct. Tex. 1891).

§ 121 (note 1, p. 223). The payee named in the contract is the proper party to collect the insurance money, though it may appear that such payment is intended to be ultimately for the benefit of another. Pacific Mutual Co. *v.* Williams, above.

§ 121 (note 2, p. 224). A beneficiary who is not a party cannot sue on a contract under seal. Burns *v.* Grand Lodge A. O. U. W., 26 Northeastern Rep. 443 (Supm. Ct. Mass. 1891).

§ 122 (note 1, p. 227). That the existence of a remedy in equity on such a contract, does not necessarily preclude a remedy at law on the same contract, see Ring *v.* U. S. Assoc., 33 Ill. App. 168 (1889).

Of course, where the contract is merely a contract to pay, and not a contract to *make an assessment* and pay, what has been said as to the propriety of a remedy in equity, does not apply. Id.

§ 123 (note, p. 229). As to sufficiency of plaintiff's pleading in action on contract, see Forse *v.* Supreme Lodge Knights of Honor, 41 Mo. App. 106, 112 (1890).

As to sufficiency of pleading by insurer, see Provincial Bank *v.* Brocklebank, 26 L. R. (Irish), 572 (1890).

§ 123 (note, p. 231). That a benefit certificate is *prima facie* proof of good standing, see Forse *v.* Supreme Lodge Knights of Honor,

41 Mo. App. 106, 117 (1890). See also, as to evidence of good standing, Supreme Council Catholic Knights of America *v.* Connema, 3 Ohio Circuit, 130 (1888); High Court I. O. Foresters *v.* Lak, 26 Northeastern Rep. 593 (Supm. Ct. Ill. 1891); Strasser *v.* Staats, 13 N. Y. Suppl. 167 (1891; see, as to dues "accruing weekly").

§ 124 (note, p. 233). The rule in Curtis *v.* Mutual Benefit Co., that, in case of a contract to make an assessment and pay the sum resulting, breach of the contract to make the assessment, must be alleged and proved, was approved in Ring *v.* U. S. Assoc., 33 Ill. App. 168 (1889).

§ 125 (note 1, p. 237). Interest allowed as part of amount of recovery on the contract, under Illinois statute. Supreme Council Catholic Knights of America *v.* Franke, 27 Northeastern Rep. 86 (Supm. Ct. Ill. 1891).

§ 126 (note, p. 239). Under agreement to *create and maintain a death fund out of which the claims of the beneficiaries should be paid*, held incumbent on the insurer, to show that such fund had been depleted, with a sufficient excuse for its remaining in that condition, and that, in the absence of such proof, recovery could be had for the amount specified in the contract. Cushman *v.* Family Fund Soc., 13 N. Y. Suppl. 428 (1891). This is, however, hard to reconcile with the doctrine of O'Brien *v.* Home Benefit Soc., 117 N. Y. 310 (1889); (and see previous decision in 42 Hun, 426), for, if under an agreement to *make an assessment*, it will not be presumed that such assessment is sufficient to pay the amount specified, why, under an agreement to create and *maintain a fund*, should it be presumed that such fund is thus sufficient?

§ 128. In Goldbaum *v.* Blum, 15 Southwestern Rep. 564 (Supm. Ct. Tex. 1891), it seems broadly laid down that, even in the absence of agreement, a creditor insuring the life of his debtor, is entitled to retain from the proceeds, only for his debt and for premiums paid. So held, where both debtor and creditor joined in the application, and the only premium that was paid was paid by the creditor.

§ 133. In Michigan Mutual Co. *v.* Reed, 47 Northwestern Rep. 1106 (Supm. Ct. Mich. 1891), was declared the right of insured to rescind the contract, on discovering that statements were inserted in the application, by agent of insurer, at variance with those furnished by applicant.

THE

LAW OF LIFE INSURANCE.

CHAPTER I.

GENERAL NATURE OF THE CONTRACT OF LIFE INSURANCE.

§ 1. **Contracts of insurance defined.**—All that the law recognizes as of value to a person and as capable of injury are his *life*[1] and his *property*. Experience has shown that it is for the advantage, both of the individual and of the community, that the results of injury to the life or property of any particular person be, so far as is practicable, distributed among the community at large, instead of being confined to that person. Hence have originated what are known as *contracts of insurance*,[2] by means of which the

[1] We here use the term *life* in its broad sense as including *health*, for whatever operates as a diminution of *health* is in reality a diminution of *life*.

[2] In so comparatively recent a case as Lord *v*. Dall, 12 Mass. 115 (1815), it was thought necessary to examine and decide the funda-

comparatively *small* pecuniary contributions of *many* persons are made available to make compensation for the comparatively *great* injury to the life or property of *one* person. A contract of insurance, then, is a *contract to make compensation* (*or pay*) *on the happening of an injury to life or property.*[1] The payment is usually in money

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mental question, whether a contract of life insurance is not inherently invalid. For a historical account of the origin of life insurance, see *Encyclopædia Britannica*, subject "Insurance."

[1] In Commonwealth *v.* Wetherbee, 105 Mass. 149, 160 (1870), the contract of (life) insurance was defined as "an agreement by which one party for a consideration (which is usually paid in money, either in one sum or at different times during the continuance of the risk) promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest." This definition was approved and adopted in the following cases: Rensenhouse *v.* Seeley, 72 Mich. 603, 617 (1888); Supreme Commandery Knights Golden Rule *v.* Ainsworth, 71 Ala. 436, 443 (1882); State *v.* Farmers' Benev. Assoc., 18 Nebr. 276, 281 (1885); Bolton *v.* Bolton, 73 Me. 299, 303 (1882).

In some cases there has been asserted a distinction between a contract for insurance against injury to life and one against injury to property, the latter being declared a *contract of indemnity* and the former a *mere contract to pay on condition.* The only significance of this distinction seems to lie in its bearing on the amount of recovery on the contract. See c. 6.

For an instance of a contract whereby one person advanced money for a benefit to be received upon the death of another, but which was held not to be a contract of insurance, see Cook *v.* Field, 14 Jurist, 951 (1850).

As to difference of effect between a breach of a condition in a life policy and a breach of a condition in a lease or similar instrument, see Roehner *v.* Knickerbocker Co., 63 N. Y. 160, 166 (1875); to difference between a contract to insure and a contract to carry, see Wright *v.* Mutual Benefit Assoc., 118 N. Y. 237, 241 (1890).

A peculiar contract held not a contract of insurance, but a contract in restraint of marriage, and unlawful and void. State *v.* Towle, 80 Me. 287 (1888).

Wagering contracts on the probability of marriage held void in Chalfant *v.* Peyton, 91 Ind. 202 (1883); James *v.* Jellison, 94 Ind. 292 (1883).

and of a specified sum,[1] and the injury or injuries insured against are usually specified.

§ 2. **Distinction between accident and other life insurance.**—We leave behind contracts for insurance against injury to property, and confine our attention to those against injury to *life*. An injury to life may be either that total loss known as *death*, or what is in reality a partial loss, consisting of what is commonly known as a *bodily injury* or an *injury to health*. Where the insurance is confined to accidental bodily injuries and death resulting therefrom, it is commonly called *accident insurance*, which is, however, merely a form of life insurance and governed by the same general principles, as we shall from time to time see hereafter.

§ 3. **The rules applicable to contracts generally, also applicable to contracts of life insurance.**—A contract of insurance being, then, in essence merely a contract to pay on the happening of a certain condition, the natural inference is, that this contract should be governed by the rules applicable to contracts generally. But the courts have frequently fallen into the error of regarding a contract of insurance as a contract *sui generis*, so to speak, scarcely governed by the most familiar rules applied to contracts generally. But it is now generally accepted that a contract of insurance is to be governed by *the same principles* applicable generally to agreements involving pecuniary

[1] An ordinary life policy held not an "instrument for the payment of money upon demand or at a particular time" within the meaning of N. Y. Code Civ. Pro. § 1778. McKee *v.* Metropolitan Co., 25 Hun, 583 (1881), where it is said of the policy: "It is evidence of no debt of itself—it is a conditional contract." But such a policy held a "security for money," under a statute. Stokoe *v.* Cowan, 29 Beavan, 637 (1861).

obligation.[1] The only modification of this rule exists in case of *ambiguity in the contract*, in which case the construction most unfavorable to the insurer will be adopted, and properly, for by universal custom it is the insurer that prepares the contract and furnishes the language used.[2]

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[1] St. John *v.* American Mutual Co., 13 N. Y. 31, 39 (1855); Dwight *v.* Germania Co., 103 N. Y. 341, 346 (1886); Paul *v.* Travelers' Co., 112 N. Y. 472, 479 (1889); Wiggin *v.* Knights of Pythias, 31 Fed. Rep. 122 (1887); Hutson *v.* Merrifield, 51 Ind. 24, 29 (1875); U. S. Mutual Accident Assoc. *v.* Newman, 84 Va. 52, 58 (1887); Powers *v.* Northeastern Mutual Assoc., 50 Vt. 630 (1878); Hudson *v.* Knickerbocker Co., 28 N. J. Eq. 167 (1877). For instances of cases where provisions have been upheld as not repugnant to the contract of insurance, see Bruton *v.* Metropolitan Co., 48 Hun, 204 (1888; provision that nothing should be due under the policy, if the insured died within three months from the issuing thereof); Frey *v.* Germania Co., 56 Mich. 29 (1885; limiting payment, in case of insane suicide, to legal reserve). See generally, as to repugnancy, Salentine *v.* Mutual Benefit Co., 24 Fed. Rep. 159 (1885).

Contract made on Sunday held invalid. Heller *v.* Crawford, 37 Ind. 279 (1871).

As to usury in contract, see Crane *v.* Homœopathic Mutual Co., 27 N. J. Eq. 484 (1875); affirming 25 N. J. Law, 418 (1874); Downes *v.* Green, 12 Mees. & W. 481 (1844).

As to the rules governing the admission of parol evidence, see c. 2.

[2] Foot *v.* Ætna Co., 61 N. Y. 571, 575 (1875); Dilleber *v.* Home Co., 69 N. Y. 256, 263 (1877); Dwight *v.* Germania Co., 103 N. Y. 341, 346 (1886); Darrow *v.* Family Fund Soc., 116 N. Y. 537, 544 (1889); Clapp *v.* Mass. Benefit Assoc., 146 Mass. 519, 530 (1888); Metropolitan Co. *v.* Drach, 101 Pa. St. 278 (1882); Burkhard *v.* Travelers' Co., 102 Pa. St. 262 (1883); Humphreys *v.* National Benefit Assoc., 20 Atlantic Rep. 1047 (Supm. Ct. Pa. 1891); Smith *v.* National Co., 103 Pa. St. 177, 182 (1883); Sheerer *v.* Manhattan Co., 16 Fed. Rep. 720 (1883); Dreier *v.* Continental Co., 24 Fed. Rep. 670 (1885); Penn. Mutual Co. *v.* Wiler, 100 Ind. 92, 98 (1884); Northwestern Mutual Co. *v.* Hazelett, 105 Ind. 212, 215 (1885); Ætna Co. *v.* Deming, 123 Ind. 384, 387 (1889); Schultz *v.* Ins. Co., 40 Ohio St. 217 (1883); Miller *v.* Mutual Benefit Co., 31 Iowa, 216, 236 (1871); Symonds *v.* Northwestern Mutual Co., 23 Minn. 491, 501 (1877); U. S. Mutual Accident Assoc. *v.* Newman, 84 Va. 52, 59 (1887); Utter *v.* Travelers' Co., 65 Mich. 545, 555 (1887); Alabama Gold Co. *v.* Johnson, 80 Ala. 467, 471 (1886); Anders *v.* Su-

§ 4. **Contracts of reinsurance.**—An important application of a principle belonging to the general law of contracts is seen in what are known as *contracts of reinsurance.* Generally speaking, the rights of a party to a contract may, by assignment or novation, be transferred to a third person. Obviously, however, this cannot be done without the assent of the other party to the contract.[1] So (to anticipate the definitions of *insurer* and *insured*) sometimes the insurer, with the assent of the insured, transfers his rights and liabilities under the contract to another insurer, who then, in the absence of special restriction, stands in the place of the original insurer as to all these rights and liabilities. Such a transfer is known as a *contract of reinsurance.* The effect of *assignment by the insured,* which presents certain peculiarities arising from the special nature of the contract of insurance will be considered hereafter.[2] But the substitution of a new *insurer* in place of the original one, by the contract of *reinsurance,* seems to involve no legal principles essentially different from those applicable to contracts generally.[3]

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preme Lodge Knights of Honor, 51 N. J. Law, 175 (1889). For extreme applications of this doctrine, see Home Mutual Assoc. *v.* Gillespie, 110 Pa. St. 84 (1885); Brown *v.* Railway Passenger Co., 45 Mo. 221 (1870).

[1] That this is true of contracts of insurance, see Lovell *v.* St. Louis Mutual Co., 111 U. S. 264, 273 (1884).

[2] See c. 4.

[3] Smith *v.* St. Louis Mutual Co., 2 Tenn. Ch. 727, 742 (1877). As to liability of reinsurer to insured, see Glen *v.* Hope Mutual Co., 56 N. Y. 379 (1874); Fischer *v.* Hope Mutual Co., 69 N. Y. 161 (1877); Price v. St. Louis Mutual Co., 3 Mo. App. 262, 271 (1877); Relfe *v.* Columbia Co., 10 Mo. App. 150 (1881); Ewing *v.* Coffman, 12 Lea (Tenn.), 79 (1883); Lee *v.* Fraternal Mutual Co., 1 Handy (Ohio), 217 (1854). Compare Stanley *v.* Northwestern Assoc., 36 Fed. Rep. 75 (1887); Stedman *v.* American Mutual Co., 45 Conn. 377, 381 (1877). As to liability between reinsurer and original insurer, see Philadelphia Co. *v.* American Co., 23 Penn. St. 65 (1854); Traill. *v.* Baring, 33 L. J. Ch. 521 (1864). Compare Alexander *v.* Williams, 14 Mo. App. 13 (1883).

§ 5. **Law of place.**—In the absence of agreement to the contrary, a contract is governed by the law of the place where it is made, unless it is to be performed in another place than that where it is made, in which case it is governed by the law of the place of performance.[1] There is no reason why this should not apply to insurance like other contracts, and it has so been held. The question *where* the contract was made usually resolves itself into the question *when* the contract was made or consummated. Thus, suppose the contract to be evidenced by a policy issued by a company having its home office in one State, the insured being a resident of another State, and the policy being delivered to him there. As we shall see more fully elsewhere,[2] the question of *when* the contract is consummated is not necessarily determined by the time of the delivery of the policy, and if the application is unconditionally accepted by the company at its home office, that is the place where the contract is made, irrespective of the policy, which merely evidences the contract, being delivered at another time and place.[3] *A fortiori* is the State where

On assumption by one insurer of the risks of another and the issuance of new policies for the old, held, under the circumstances, that warranties in the new policies were to be construed as of the date of the old, not the new policies. Cahen *v.* Continental Co., 69 N. Y. 300, 306 (1877); which see also as to effect of contract whereby an insurer assumes the outstanding risks of another without right to discriminate or reject.

[1] Story on Conflict of Laws, §§ 272, 280.

[2] See § 24.

[3] Thus a policy taken out by a resident of Scotland in an English company was held governed by the law of England, it appearing that the proposal was made to the agents of the insurer at Edinburgh, who had no authority to consummate the contract, but that the proposal was sent to London, where the policy was prepared, and thence transmitted to the agents at Edinburgh, by whom it was delivered to the insured. No place of *performance* was fixed by the contract. Parken *v.* Royal Exchange Co., 8 Scotch Session Cases, 2d Series, 365 (1846). So a policy taken out by a resident of Canada in a company located in New

the home office is located the place of the contract, if the contract by its terms is to be performed there. The better opinion would seem to be that the act of payment by the

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York, was held governed by the law of New York, all the essential circumstances being the same as in the Scotch case cited, save that here the contract was by its terms payable in New York. Equitable Co. *v.* Perrault, 26 Lower Canada Jurist, 382 (1882; where the question was as to the application of the money due under the contract). So as to a substantially similar state of facts as in Equitable Co. *v.* Perrault (substituting *Massachusetts* and *New Jersey* for *Canada* and *New York* respectively). Desmazes *v.* Mutual Benefit Co., 7 Ins. L. J. 926 (1878). To same effect as to contract negotiated in Massachusetts but consummated in New York. Shattuck *v.* Mutual Co., 7 Reporter, 171 (1878). The company being incorporated in New Jersey, the policy purporting on its face to have been executed in that State, and no place for payment being mentioned, held that the validity of the contract and the rights and obligations of the parties depended on the laws of New Jersey, though the contract was actually made in Georgia, and the suit thereon was brought in New York. Ruse *v.* Mutual Benefit Co., 23 N. Y. 516, 521 (1861). Policies obtained in New York from companies existing under the laws of that State, held governed by the law of that State as to any charge upon such policies considered as a part of the separate estate of a married woman, though the note by which such charge was sought to be created was executed in another State. Bloomingdale *v.* Lisberger, 24 Hun, 355 (1881).

But the contract was held governed by the law of the State where the policy was delivered and the insurance money paid, though the insurer was a corporation of another State. Adler *v.* Stoffel, 46 Northwestern Rep. 891 (Supm. Ct. Wis. 1890). And the accepted doctrine seems to have been lost sight of in Pomeroy *v.* Manhattan Co., 40 Ill. 398 (1866), where a policy issued by a New York company was declared to be an Illinois contract, on the ground *that the acts necessary by the terms of the contract to make it binding were performed in Illinois*. But clearly these acts were not *the performance of the contract*. As, however, it appears that the contract was also to be performed in Illinois, the decision was right in result. The same rule was, however, applied in Pace *v.* Pace, 19 Fla. 438, 450 (1882); Continental Co. *v.* Webb, 54 Ala. 688, 698 (1875).

In Washington Central Bank *v.* Hume, 128 U. S. 195, 207 (1888), the contract was declared governed by the law of the place where it was *both* made and performed. And this seems to be the effect of De Ronge

insurer constitutes performance.[1] With reference to the law governing an *assignment* of a contract of insurance, it would seem that, as such assignment, instead of being of itself a distinct contract, is rather a mere incident of the original contract, the law governing the assignability of the contract is that of the place of the original contract,[2]

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v. Elliott, 23 N. J. Eq. 486, 494 (1873); Knapp *v.* Homœopathic Mutual Co., 117 U. S. 411 (1886).

See, also, as to law governing contract, Brown's Appeal, 125 Pa. St. 303 (1889); Fuller *v.* Linzee, 135 Mass. 468, 471 (1883); Van Creelen *v.* Mass. Mutual Co., 35 La. Ann. 226 (1883); Supreme Council American Legion of Honor *v.* Green, 71 Md. 263 (1889); Northwestern Mutual Co. *v.* Elliott, 10 Ins. L. J. 333 (1881). As to statute of limitations applicable, see Spratley *v.* Mutual Benefit Co., 11 Bush (Ky.), 443 (1875).

[1] Though in Parken *v.* Royal Exchange Co. (see note 3, p. 6) the opinion was expressed that the "performance of the contract" was not the mere payment of the sum due, but the continued insurance of the life and the undertaking of the risk.

[2] Thus in case of a contract made and *to be performed* in a certain State, an assignment of the contract is to be determined by the law of that State, though the insurer is domiciled elsewhere. Pomeroy *v.* Manhattan Co., 40 Ill. 398 (1866); Mutual Co. *v.* Allen, 138 Mass. 24, 26 (1884; where the parties to the assignment were domiciled in the State where the contract was made). So in case of an assignment valid by the laws of Connecticut and New Jersey but invalid by the law of New York, it was held valid, it appearing that the insurer was a Connecticut corporation, that payment was to be made in Connecticut, that the assignment, though commenced in New York, was completed and with the policy delivered in New Jersey to citizens of that State. Conn. Mutual Co. *v.* Westervelt, 52 Conn. 586, 593 (1879). See Mutual Benefit Co. *v.* Wayne County Bank, 68 Mich. 116, 131 (1888); Ford *v.* Travelers' Co., 6 Mackey (D. C.), 384, 392 (1888).

But the above authorities cannot be reconciled with Newcomb *v.* Mutual Co., 9 Ins. L. J. 124 (U. S. Circuit Court, Mass. 1880), where the assignment was held governed by the law of the place of the assignment, though the contract was made and to be performed elsewhere. To same effect are Lee *v.* Abdy, 17 L. R. Q. B. D. 309 (1886); Toronto General Trusts Co. *v.* Sewell, 17 Ontario Rep. 442 (1889); Scottish Provident Inst. *v.* Cohen, 16 Scotch Session Cases, 4th Series, 112 (1888). Thus in Lee *v.* Abdy, above, a case of an assignment valid by the

though it would also seem that this rule has frequently been lost sight of or imperfectly apprehended. But all the rules thus stated are in this country subject to the qualification that, as a State has the right to prescribe the conditions on which a *foreign insurance company* may do business therein, it may prescribe conditions concerning the form and effect of the contract made with such company. In such case a policy issued by a foreign insurance company, but taking effect by delivery in the State, must conform to such requirements, whatever the intention of the parties.[1]

§ 6. **Parties to the contract.**—The existence of a contract implies parties thereto. A contract of life insurance necessarily implies an *insurer* and a person whose life is *insured.* Inasmuch as the time for performance by the insurer of an ordinary contract of life insurance does not occur until the death of the person whose life is insured, there is commonly a third person interested in the contract as being the person to whom the amount due is to be paid. Such person we designate as the *beneficiary*.[2] The term *insured* is sometimes applied to the beneficiary, but in this work we shall apply the term *insured* to the person whose life is insured, irrespective of his deriving any benefit from the contract.[3] There is no inherent reason why any person

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law of England, but invalid by the law of Cape Colony, it was held invalid, it appearing that the assignment was made in Cape Colony between persons domiciled there. Compare Le Feuvre *v.* Sullivan, 10 Moore P. C. C. 1 (1855).

[1] Fletcher *v.* N. Y. Co., 13 Fed. Rep. 526 (1882); Wall *v.* Equitable Soc., 32 Fed. Rep. 273 (1887). See Paul *v.* Virginia, 8 Wall. 168 (1868); Manhattan Co. *v.* Warwick, 20 Gratt. (Va.), 614, 623 (1871).

[2] The rights of the beneficiary will be considered hereafter. See c. 4.

[3] The word "assured," as used in a policy, held to refer rather to the person for whose benefit the policy was taken out, than to the person on whose life it was taken. Hogle *v.* Guardian Co., 4 Abb. Pr. N. S. 346 (1868), holding in case of a policy payable to the *assured*, his admin-

capable of entering into a contract should not become an insurer, but practically, owing to the nature of the business, only corporations (usually called *companies*) become insurers.

§ 7. **A legal, not an equitable relation, created by the contract.**—The contract being merely a contract to pay, it is obvious that the relation between the parties is essentially that of *debtor and creditor;* also that it creates a *legal* as distinguished from an *equitable* obligation, there being ordinarily no circumstances on which to base the existence of equity jurisdiction.[1]

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istrators and assigns, that the person for whose benefit it was taken out could recover thereon. The same meaning was assigned to the term in Smith *v.* Ætna Co., 5 Lans. 545, 549 (1861), where the policy recited that the consideration was paid by the person for whose benefit it had been taken out; and in Conn. Mutual Co. *v.* Luchs, 108 U. S. 498, 504 (1883), holding that the application of the term generally depends on its collocation and context in the policy; and in Brockway *v.* Conn. Mutual Co., 29 Fed. Rep. 766 (1887).

[1] Thus, a policy holder has been declared a mere creditor, not a *cestui que trust*, of the company issuing the policy. Bewley *v.* Equitable Soc., 61 How. Pr. 345 (1881); Hencken *v.* U. S. Co., 16 N. Y. Weekly Digest, 44 (1882). And see *Re* Haycock's Policy, 1 L. R. Ch. D. 611 (1876); Matthew *v.* Northern Co., 9 L. R. Ch. D. 80 (1878). But see Lothrop *v.* Stedman, 42 Conn. 583, 589 (1875). In an action by a policy holder on an agreement, whereby plaintiff was to share in the profits of the company, the other policy holders were held not necessary parties. Vogler *v.* World Mutual Co., 51 How. Pr. 301 (1875). The principle that a policy holder is not a *cestui que trust* has been emphatically declared in case of the so-called *tontine policies*. See c. 6. So a policy holder has been declared not a *partner* of the company. People *v.* Security Co., 78 N. Y. 114, 122 (1879). But the members of an unincorporated benefit association were declared partners in Pritchett *v.* Shafer, 2 W. N. C. (Pa.), 317 (1875). They were declared not partners in Brown *v.* Stoerkel, 74 Mich. 269, 276 (1889). See generally as to jurisdiction of equity over unincorporated benefit associations, Van Houten *v.* Pine, 36 N. J. Eq. 133 (1882). See Brown *v.* Orr, 112 Pa. St. 233 (1886); Kuhl *v.* Meyer, 35 Mo. App. 206 (1889).

§ 8. **Mutual benefit insurance.**—The relation of insurer and insured to each other as parties to the contract of insurance, is sometimes complicated by the circumstance that the insured is a member of an association (incorporated or unincorporated) that is also the insurer. This commonly happens in the case of what are known as *mutual benefit societies.* But this additional relation as association and member is not within the scope of the law of insurance. And, generally speaking, the relation of the parties as insurer and insured is governed by precisely the same principles as in case of life insurance generally.[1] We shall, however, from time to time hereafter, point out ways in which the relation of insurer and insured is modified by

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[1] Commonwealth *v.* Wetherbee, 105 Mass. 149, 160 (1870); State *v.* Standard Life Assoc., 38 Ohio St. 281, 287 (1882); Willcuts *v.* Northwestern Mutual Co., 81 Ind. 300, 307 (1882); Elkhart Mutual Assoc. *v.* Houghton, 103 Ind. 286 (1885); Presbyterian Mutual Fund *v.* Allen, 106 Ind. 593, 594 (1886); Holland *v.* Taylor, 111 Ind. 121, 126 (1887); Golden Rule *v.* People, 118 Ill. 492 (1886); Martin *v.* Stubbings, 126 Ill. 387, 403 (1888); Rockhold *v.* Canton Masonic Benev. Soc., 128 Ill. 440, 457 (1889); Northwestern Assoc. *v.* Wanner, 24 Ill. App., 357, 362 (1887); Miner *v.* Michigan Mutual Assoc., 63 Mich. 338 (1886); Rensenhouse *v.* Seeley, 72 Mich. 603, 617 (1888); Elkhart Mutual Aid Assoc. *v.* Houghton, 103 Ind. 286 (1885); Yoe *v.* Howard Mutual Benev. Assoc., 63 Md. 86, 91 (1884); Goodman *v.* Jedidjah Lodge, 67 Md. 117, 128 (1887); Supreme Commandery Knights Golden Rule *v.* Ainsworth, 71 Ala. 436, 443 (1882); Block *v.* Valley Mutual Assoc., 52 Ark. 201, 205 (1889); Farmer *v.* State, 69 Tex. 561, 566 (1888); McCorkle *v.* Texas Benev. Assoc., 71 Tex. 149 (1888); State *v.* Farmers' Benev. Assoc., 18 Nebr. 276 (1885); Bolton *v.* Bolton, 73 Me. 299, 303 (1882); Swett *v.* Citizens' Mutual Relief Soc., 78 Me. 541 (1886). Compare Commonwealth *v.* Equitable Beneficial Assoc., 18 Atlantic Rep. 1112 (Supm. Ct. Pa. 1890); State *v.* Iowa Mutual Aid Assoc., 59 Iowa, 125 (1882). See Mellows *v.* Mellows, 61 N. H. 137 (1881); Smith *v.* Bullard, 61 N. H. 381 (1881). As to effect of statute, see State *v.* Whitmore, 75 Wis. 332 (1889); State *v.* Western Union Mutual Co., 24 Northeastern Rep. 392 (Supm. Ct. Ohio, 1890; foreign company).

the existence of the parallel relation of association and member.[1]

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[1] The decisions as to the relation between the member and the society as *insured* and *insurer* will be elsewhere found under the various appropriate headings, but we here gather some of the decisions as to their relation as *association* and *member*, though, strictly speaking, these decisions do not come within the scope of this work.

The duty of a member to resort to the tribunals of society for redress before resorting to the courts was, under varying circumstances, asserted in Poultney *v.* Bachman, 31 Hun, 49, 54 (1883); Karchner *v.* Supreme Lodge Knights of Honor, 137 Mass. 368 (1884); Screwmen's Benev. Assoc. *v.* Benson, 76 Tex. 552 (1890); Essery *v.* Court Pride of Dominion, 2 Ontario Rep. 596 (1882). See, however, Mulroy *v.* Supreme Lodge Knights of Honor, 28 Mo. App. 463, 468 (1888). As to termination of membership in mutual benefit society, see McDonald *v.* Ross Lewin, 29 Hun, 87 (1883); Wendt *v.* Order Germania, 8 N. Y. State Reporter, 351 (1887; asserting right of member to renounce his membership without consent of *beneficiary*); Burbank *v.* Boston Police Relief Assoc., 144 Mass. 434 (1887); Rood *v.* Railway Passenger, &c., Assoc., 31 Fed. Rep. 62 (1887); Borgraefe *v.* Supreme Lodge Knights of Honor, 26 Mo. App. 218 (1887; asserting right of member to renounce his membership without consent of *society*); Cramer *v.* Masonic Life Assoc., 9 N. Y. Suppl. 356 (1890).

Expulsion or suspension from membership was, under varying circumstances, declared legal in Pfeiffer *v.* Weishaupt, 13 Daly, 161 (1885); Lehman *v.* District No. 1 of B'nai Berith, 23 N. Y. Weekly Digest, 409 (1886); Sperry's Appeal, 116 Pa. St. 391 (1887); Hawkshaw *v.* Supreme Lodge Knights of Honor, 29 Fed. Rep. 770 (1887); Brown *v.* Grand Council Northwestern Legion of Honor, 46 Northwestern Rep. 1086 (Supm. Ct. Iowa, 1890). Even in case of the insanity of the member. Pfeiffer *v.* Weishaupt, 13 Daly, 161 (1885). But see Supreme Lodge A. O. U. W. *v.* Zuhlke, 129 Ill. 298 (1889), where expulsion of an insane member was declared illegal.

Expulsion or suspension from membership was, under varying circumstances, declared illegal in People *v.* St. Franciscus Soc., 24 How. Pr. 216 (1862); Wachtel *v.* Noah Widows', &c., Soc., 84 N. Y. 28 (1881); Fritz *v.* Mack, 62 How. Pr. 69 (1881); Downing *v.* St. Columbus Soc., 10 Daly, 262 (1881); Lazensky *v.* Supreme Lodge Knights of Honor, 31 Fed. Rep. 592 (1887); Supreme Lodge Knights of Honor *v.* Johnson, 78 Ind. 110 (1881); Supreme Lodge A. O. U. W. *v.* Zuhlke, 129 Ill. 298 (1889); Allnut *v.* Subsidiary High Court, 62 Mich. 110 (1886); Erd *v.*

§ 9. **Agents of insurer.**—As the insurer is always, or nearly always, a corporation, and as a corporation can act only through its agents, the authority of agents to contract in place of the company must be considered. Generally speaking, the authority of agents of an insurance company, like that of agents of other corporations, is to be determined by the rules applicable to agents generally.[1] The

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Bavarian, &c., Assoc., 67 Mich. 233 (1887); Peet *v.* Great Camp Knights of Maccabees, 47 Northwestern Rep. 119 (Supm. Ct. Mich. 1890); Mulroy *v.* Supreme Lodge Knights of Honor, 28 Mo. App. 463 (1888; where see many authorities cited); Otto *v.* Journeyman Tailors' Union, 75 Cal. 308 (1888); Supreme Lodge Knights of Honor *v.* Wickser, 72 Tex. 257 (1888); People *ex rel.* McQuien *v.* Theatrical Mechanical Assoc., 8 N. Y. Suppl. 675 (1890); Simmons *v.* Syracuse, B. & N. Y., &c., Assoc., 10 N. Y. Suppl. 293 (1890); Vivar *v.* Supreme Lodge Knights of Pythias, 20 Atlantic Rep. 36 (Supm. Ct. N. J. 1890).

As to evidence of restoration to membership after expulsion or suspension, see Gaige *v.* Grand Lodge A. O. U. W., 48 Hun, 137 (1888); Marck *v.* Supreme Lodge Knights of Honor, 29 Fed. Rep. 896 (1886); Hoffman *v.* Supreme Council American Legion of Honor, 35 Fed. Rep. 252 (1888); Davidson *v.* Old People's Soc., 39 Minn. 303 (1888); Vivar *v.* Supreme Lodge Knights of Pythias, 20 Atlantic Rep, 36 (Supm. Ct. N. J. 1890); Schmidt *v.* Abraham Lincoln Lodge, 84 Ky. 490 (1886; where a subordinate society having refused to comply with the order of a higher tribunal restoring an expelled member, was held not entitled to enforce against him a note given for funds of the society loaned); Connelly *v.* Masonic Mutual Assoc., 20 Atlantic Rep. 671 (Supm. Ct. Conn. 1890; restoration sustained though made after death of member).

As to election of remedies for expulsion from membership, see State *v.* Slavonska Leipa, 28 Ohio St. 665 (1876).

As to rights of seceding members, see Goodman *v.* Jedidjah Lodge, 67 Md. 117 (1887).

A minor held capable of becoming a member. Chicago Mutual Indemnity Assoc. *v.* Hunt, 127 Ill. 257, 277 (1889).

1 See (Southern) Co. *v.* McCain, 96 U. S. 84 (1877). In McGurk *v.* Metropolitan Co., 56 Conn. 528, 540 (1888), cases are cited as "fully sustaining the doctrine that knowledge affecting the rights of the insured, which comes to an agent of an insurance company while he is performing the duties of his agency in procuring applications for insurance and delivering policies and collecting premiums, becomes the

dealings between the company and the insured are usually effected by means of the intervention of a person commonly spoken of as the *agent* of the company. This is perhaps scarcely an accurate use of the term. Such person, standing as a means of communication between the insurer and the insured, is perhaps more properly characterized as a *broker* or *solicitor*.[1] But, at any rate, whatever be the *status* of such agent or broker, in the absence of agreement between the parties defining such *status*, his powers with reference to the subject-matter of the contract are almost universally prescribed and limited by the terms of the agreement,[2] to say nothing of the limitations imposed by custom and common understanding, which may perhaps be regarded as incorporated by implication into the contract. So far, however, as the powers of such an agent are not

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knowledge of the company." To same effect, Eastman *v.* Provident Mutual Assoc., 18 Atlantic Rep. 745 (Supm. Ct. N. H. 1889). In Phœnix Mutual Co. *v.* Hinesley, 75 Ind. 1, 10 (1881), it is said with reference to "agents of foreign companies transacting the business of insurance for their companies in the State," that "notice to such agents, in relation to any business of insurance transacted by them for their companies, is notice to such company."

The company was held liable even for the *fraudulent act* of its agent committed in the course of his employment in Mass. Mutual Co. *v.* Eshelman, 30 Ohio St. 647 (1876; substituting spurious for genuine application); N. Y. Co. *v.* McGowan, 18 Kans. 300 (1877); McArthur *v.* Home Assoc., 73 Iowa, 336 (1887; inserting false statement in application). To the contrary, Ryan *v.* World Co., 41 Conn. 168, 171 (1874; inserting false statement in application). But of course where the insured is party to the fraudulent act of the agent, he cannot hold the insurer liable therefor. Hanf *v.* Northwestern Masonic Aid Assoc., 76 Wis. 450 (1890); Lewis *v.* Phœnix Mutual Co, 39 Conn. 104 (1872).

[1] See Bushaw *v.* Women's Mutual Co., 8 N. Y. Suppl. 428 (Supm. Ct. N. Y. 1889).

[2] As to limitations on authority of agent to bind insurer by provisions in contract, see Tifft *v.* Phœnix Mutual Co., 6 Lans. 198 (1871); Markey *v.* Mutual Benefit Co., 103 Mass. 78, 92 (1869; sub-agent of foreign company).

otherwise defined, there is in many decisions a distinction recognized as to authority, between *general* and *local* agents. This distinction is not easy to define, beyond that it seems to rest mainly on the extent of territory covered by the agency.[1] The chief importance of the distinction, so far as the rights of the insured are concerned, seems to lie in this, that, whatever be the authority of a general agent to waive a material condition in the contract, a local agent has no such power.[2]

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[1] As is said in Murphy *v.* Southern Co., 3 Baxt. (Tenn.), 440, 448 (1874); "The term 'local agent' conveys no other meaning than that of an agent at a particular place or locality, but whether such an agent has general or limited powers is not determined by simply calling him a 'local agent.'" An agent held a general agent, though his authority was limited to a single State. Southern Co. *v.* Booker, 9 Heisk. (Tenn.), 606, 613 (1872); especially where the insuring company was located in a State (Connecticut) remote from that where the insurance was effected (Kentucky). Hartford Co. *v.* Hayden, 13 Southwestern Rep. 585 (Ct. of App. of Ky. 1890), where it is said that such agent "should be regarded as possessing all the powers of those in charge of its (the company's) business at the head or home office."

Where the contract of insurance required notice of change of occupation, death or total disablement by accident to be given to same agent who wrote the policy, settled the terms of insurance, investigated losses and recommended payment or non-payment, such agent held to be a general agent without regard to extent of territory or scope of powers. Travelers' Co. *v.* Harvey, 82 Va. 949, 956 (1885). See, also, Somers *v.* Kansas Protective Union, 42 Kans. 619 (1889).

[2] The power of a local agent to waive a material condition of the contract was denied in Willcuts *v.* Northwestern Mutual Co., 81 Ind. 300, 308 (1882). See, also, People *v.* Mutual Benefit Associates, 20 N. Y. Weekly Digest, 546 (1885; mutual benefit society).

"An insurance company establishing a local agency must be held responsible to the parties with whom they transact business, for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal." (Union Mutual) Co. *v.* Wilkinson, 13 Wall. 222, 235 (1871; Miller, J.); S. P., Piedmont & Arlington Co. *v.* Young, 58 Ala. 476, 485 (1877). See Brown *v.* Railway Passenger Co., 45 Mo. 221 (1870).

The authority of a local agent of a *foreign* company to dispense with *any* condition in the contract, in the absence of limitation on his authority, was asserted in Schmidt *v.* Charter Oak Co., 2 Mo. App. 339 (1876; condition as to limits of residence).

In McCoy *v.* Roman Catholic Mutual Co., 25 Northeastern Rep. 289 (Supm. Ct. Mass. 1890), it was declared to be "well settled that the officers of a mutual insurance company have no authority to waive its by-laws which relate to the substance of the contract between an individual member and his associates in their corporate capacity."

CHAPTER II.

NEGOTIATION AND CONSUMMATION OF THE CONTRACT.

§ 10. **The application.**—It is evident that, as preliminary to any express contract, there must be a proposition from one or the other of the parties, which proposition must be acted on or accepted in order to constitute a complete, binding contract. There is no inherent reason why the proposition to enter into a contract of insurance should not proceed from the insurer, as well as from the insured, and, indeed, it sometimes does, but, generally speaking, the proposition is made, or is regarded as being made by the insured. The proposition so made is commonly embodied in a writing called the *application*.[1]

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[1] As to estoppel on insurer to object that application was not signed

§ 11. **Form of the contract.**—Logically, a statement of the negotiations leading to the consummation of the contract should precede a statement of the form of the contract as consummated. But in discussing the rules governing the negotiation, the form will be so frequently referred to that it seems desirable to state it here. Like contracts to pay, generally, a contract of insurance may be valid though verbal;[1] *a fortiori*, if in writing it need not be under seal.[2] And although the form of the contract, when in writing, is, by usage, prescribed within somewhat narrow limits, no particular form is necessary.[3] The writ-

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by applicant, see Bohninger *v.* Empire Mutual Co., 2 T. & C. (N. Y.), 610 (1874); Somers *v.* Kansas Protective Union, 42 Kans. 619 (1889).

As to what constitutes part of application, see Mace *v.* Provident Assoc., 101 N. C. 122 (1888). See forms in Appendix.

[1] Alabama Gold Co. *v.* Mayes, 61 Ala. 163 (1878). And in Rhodes *v.* Railway Passenger Co., 5 Lans. 71 (1871), the power of an agent of the insuring company to so contract was held not necessarily limited by his possession of a book of blank policies signed by the president of the company.

[2] Gates *v.* Home Mutual Co., 4 Am. L. Rec. 395, 399 (Cin. Ohio, 1875). As to effect of statutory requirement of seal, see London Co. *v.* Wright, 5 Canada Supm. Ct. 466 (1880).

[3] Receipt for premium held, under the circumstances, not to constitute a contract of insurance. Todd *v.* Piedmont & Arlington Co., 34 La. Ann. 63 (1882).

A writing held not a contract of insurance but merely an agreement to return money received unless a policy should be issued and furnished within a certain time. Marks *v.* Hope Mutual Co., 117 Mass. 528 (1875).

An *endorsement* on a policy held to be not a substantive stipulation, but merely explanatory of stipulations in the policy. Stone *v.* U. S. Casualty Co., 34 N. J. Law, 371, 376 (1871). But an entry upon the margin of a policy was regarded as part of the contract in Patch *v.* Phœnix Mutual Co., 44 Vt. 481 (1872). See Confederation Life Assoc. *v.* O'Donnell, 10 Canada Supm. Ct. 92 (1882).

As to the effect of a memorandum not purporting on its face to be a condition upon which the insurance was effected, printed in an obscure place on the policy, and in no way referred to in the policy itself, see Girard Co. *v.* Mutual Co., 97 Pa. St. 15, 29 (1880).

ing thus evidencing the contract is ordinarily known as the *policy*. In case of mutual benefit insurance, however, the writing evidencing the contract is regarded as evidencing rights of membership also. It is, therefore, something more than a policy, and is commonly called a *certificate*. The essential distinction between contracts of mutual benefit insurance and other contracts of insurance is this, that (and this is equally applicable to other cases where the insured is a member of the insuring body) in the former the fact of membership carries with it the obligation derived from the rules of the society as well as from the public laws applicable.[1] And the member is presumed to know and is bound by such rules, though not referred to in his certificate.[2] But this, it would seem, is subject to

[1] Mulroy *v.* Supreme Lodge Knights of Honor, 28 Mo. App. 463, 472 (1888); Masonic Mutual Soc. *v.* Burkhart, 110 Ind. 189 (1886); Van Poucke *v.* St. Vincent De Paul Soc., 63 Mich. 378 (1886); Mills *v.* Rebstock, 29 Minn. 380 (1882); St. Mary's Soc. *v.* Burford, 70 Pa. St. 321 (1872; by-law withholding benefits in case of intemperance, &c., sustained as reasonable). On this ground, misrepresentation and concealment on the application were allowed as a defense as being in violation of the *constitution and by-laws*, though the application was not referred to in the *policy*. Grossman *v.* Supreme Lodge Knights of Honor, 13 N. Y. State Reporter, 592 (1888). So, in an action on the contract, a pamphlet containing the charter and by-laws of the company was held properly admitted against the insured. Mutual Co. *v.* Bratt, 55 Md. 200 (1880). A statutory provision in favor of the insured may be waived by him. Caffery *v.* John Hancock Mutual Co., 27 Fed. Rep. 25 (1886); Desmazes *v.* Mutual Benefit Co., 7 Ins. L. J. 926 (1878).

[2] Holland *v.* Taylor, 111 Ind. 121, 125 (1887); Bauer *v.* Samson Lodge Knights of Pythias, 102 Ind. 262, 267 (1885); Supreme Lodge Knights of Pythias *v.* Knight, 117 Ind. 489, 496 (1888); Gray *v.* Supreme Lodge Knights of Honor, 118 Ind. 293, 300 (1888); Protection Co. *v.* Foote, 79 Ill. 361, 368 (1875); Supreme Commandery Knights Golden Rule *v.* Ainsworth, 71 Ala. 436, 443 (1882); Splawn *v.* Chew, 60 Tex. 532, 535 (1883); Thomas *v.* Leake, 67 Tex. 469 (1887); Whitehurst *v.* Whitehurst, 83 Va. 153 (1887); Coleman *v.* Supreme Lodge Knights of Honor, 18 Mo. App. 189 (1885); Borgraefe *v.* Supreme

the qualification that the rules that he is thus presumed to know and is bound by, are not the regulations adopted by the officers in regard to the transaction of business, but only such rules as enter into the constitution of the society as provisions of the charter or by-laws.[1] And such rules being part of the contract are binding on the insuring company, as well as on the insured member,[2] though it is clear that by the contract itself the right to make changes in the by-laws or other rules may be reserved by the company.[3] In case of a conflict between the provisions of the certificate and those of the existing by-laws the former will prevail.[4] And the general object of these societies being to make and carry out contracts of insurance, it is properly held that their rules and regulations will be liberally construed to effect such object.[5]

§ 12. **Warranties defined.**—Although a contract of insurance is in essence a mere contract to pay money on the happening of a specified loss or injury, yet in practice the

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Lodge Knights of Honor, 22 Mo. App. 127, 140 (1886); Hesinger *v.* Home Benefit Assoc., 41 Minn. 516 (1889).

[1] So held in Walsh *v.* Ætna Co., 30 Iowa, 133, 145 (1870); Hirschl *v.* Clark, 47 Northwestern Rep. 78 (Supm. Ct. Iowa, 1890).

[2] Covenant Benefit Assoc. *v.* Spies, 114 Ill. 463, 469 (1885); Northwestern Benev. Assoc. *v.* Wanner, 24 Ill. App. 357, 362 (1887). For instance of "rule" held not binding as by law, see Irish Catholic Benev. Assoc. *v.* O'Shaughnessy, 76 Ind. 191 (1881).

[3] As to such right, see Supreme Lodge Knights of Pythias *v.* Knight, 117 Ind. 489, 497 (1888); Stohr *v.* San Francisco Musical Fund Soc., 82 Cal. 557 (1890); Georgia Masonic Co. *v.* Gibson, 52 Ga. 640 (1874); Supreme Commandery Knights Golden Rule *v.* Ainsworth, 71 Ala. 436, 449 (1882); Fugure *v.* Mutual Society of St. Joseph, 46 Vt. 362 (1874). So of change in charter. Allen *v.* Life Assoc. of America, 8 Mo. App. 52 (1879).

[4] Davidson *v.* Old People's Soc., 39 Minn. 303 (1888).

[5] Supreme Lodge Knights of Pythias *v.* Schmidt, 98 Ind. 374, 381 (1884); Keener *v.* Grand Lodge A. O. U. W., 38 Mo. App. 543, 553 (1889); Jewell *v.* Grand Lodge A. O. U. W., 41 Minn. 405 (1889).

happening of such loss or injury is not the only condition on which such payment depends. Besides this, the payment is commonly made conditional on the truth of certain statements made by the applicant. Without for the present discussing the burden of proof as to the truth of such statements, it may be said that their falsity prevents the liability of the insurer from taking effect. Such statements are called *warranties.*[1]

§ **13. Representations defined.**—We have seen that a contract of insurance is merely a contract to pay on the

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[1] Campbell *v.* New England Mutual Co., 98 Mass. 381, 389 (1867); Price *v.* Phœnix Mutual Co., 17 Minn. 497, 503 (1871); Alabama Gold Co. *v.* Johnston, 80 Ala. 467 (1886). Where the proof in regard to the falsity of a warranty is wholly in writing, the court is to decide the same as a matter of law. McCollum *v.* Mutual Co., 55 Hun, 103, 108 (1890). See Dwight *v.* Germania Co., 103 N. Y. 341, 352 (1886). And where the contract is wholly in writing, the question whether a given expression constitutes a warranty is one of law. Morgan *v.* Bloomington Mutual Assoc., 32 Ill. App. 79 (1889). In Kenyon *v.* Knights Templar Assoc., 122 N. Y. 247, 250 (1890), in considering the truth of a warranty, it was said: "As a general rule, the construction of a written instrument is a question of law for the court to determine; but when the language employed is not free from ambiguity, or when it is equivocal, and its interpretation depends upon the sense in which the words were used in view of the subject to which they relate, the relation of the parties and the surrounding circumstances properly applicable to it, the intent of the parties becomes a matter of inquiry and the interpretation of the language used by them is a mixed question of law and fact." For an illustration of a *promissory* warranty, see Boyce *v.* Phœnix Mutual Co., 14 Canada Supm. Ct. 723 (1887). Thus in case of agreement not to "practice any bad or vicious habit that tends to the shortening of life." Holterhoff *v.* Mutual Benefit Co., 3 Am. L. Rec. (Cin. Ohio), 272, 288 (1874). And of agreement to perform certain religious duties. Matt *v.* Roman Catholic Protective Soc., 70 Iowa, 455 (1886). A policy held forfeited for violation of a condition subsequent (against foreign travel), without notice of forfeiture being given, notwithstanding the existence in the policy of an express provision for forfeiture without notice for non-payment of premiums. Douglas *v.* Knickerbocker Co., 83 N. Y. 492, 500 (1881).

happening of a certain condition, and, as such, governed by the principles applicable to other agreements involving pecuniary obligation. Hence it is (or should be) governed by the rule that a written contract supersedes all prior negotiations. That this is so, as a general rule, has frequently been recognized,[1] as have such qualifications of the rule as that parol evidence is admissible to *explain* the contract,[2] or to show a *waiver* of its condition,[3] or to show that an instrument is not the contract of a given party.[4] But yet there has arisen the seemingly anomalous and inconsistent doctrine that, notwithstanding the existence of a written contract of insurance, evidence is admissible of prior statements of the insured, verbal[5] as well as written, relative to the subject of the risk, and in reliance on which the insurer contracted. Such statements are called

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[1] Heim *v.* Metropolitan Co., 7 Daly, 536 (1878); Pohalski *v.* Mutual Co., 36 N. Y. Super. Ct. 234, 249 (1873; permit to travel); May *v.* N. Y. Safety Reserve Soc., 13 N. Y. State Reporter, 66 (1888); Smith *v.* National Co., 103 Pa. St. 177, 184 (1883); Sullivan *v.* Cotton States Co., 43 Ga. 423 (1871); Russell *v.* Russell, 64 Ala. 500 (1879); Mobile Co. *v.* Pruett, 74 Ala. 487, 497 (1883); National Mutual Benefit Assoc. *v.* Heckman, 86 Ky. 254 (1887); Nashville Co. *v.* Mathews, 8 Lea (Tenn.), 499, 508 (1881); Trager *v.* Louisiana Equitable Co., 31 La. Ann. 235 (1879).

[2] Bolton *v.* Bolton, 73 Me. 299, 303 (1882).

[3] Schmidt *v.* Charter Oak Co., 2 Mo. App. 339 (1876).

[4] McLean *v.* Piedmont & Arlington Co., 29 Gratt. (Va.), 361, 376 (1877). As to correction of mistake in contract, see Gray *v.* Supreme Lodge Knights of Honor, 118 Ind. 293, 297 (1888); Scott *v.* Provident Mutual Assoc., 63 N. H. 556 (1885); Zallee *v.* Conn. Mutual Co., 12 Mo. App. 111 (1882); Steines *v.* Manhattan Co., 34 Fed. Rep. 441 (1888); Massey *v.* Cotton States Co., 70 Ga. 794 (1883); Collett *v.* Morrison, 9 Hare, 162 (1851); Parsons *v.* Bignold, 13 Sim. Ch. 518 (1843); Fowler *v.* Scottish Equitable Co., 28 L. J. Ch. 225 (1859); Reis *v.* Scottish Equitable Co., 2 Hurlst. & N. 19 (1857); Ætna Co. *v.* Brodie, 5 Canada Supm. Ct. 1 (1880).

[5] Mutual Benefit Co. *v.* Robertson, 59 Ill. 123, 127 (1871).

representations.[1] This doctrine is, as implied by the statement of it, subject to the qualification that if the insurer enters into the contract with knowledge that any such prior statements of the insured are false, he cannot thereafter take advantage of such falsity.[2] And the doctrine of representations does not extend so far as to include oral promissory representations, in the absence of fraud.[3] But a statement referring to existing facts will not readily be construed as including

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[1] Campbell *v.* New England Mutual Co., 98 Mass. 381, 390 (1867); Price *v.* Phœnix Mutual Co., 17 Minn. 497, 504 (1871); Wainwright *v.* Bland, 1 Mees. & W. 32 (1836); McVey *v.* Grand Lodge A. O. U. W., 20 Atlantic Rep. 873 (Supm. Ct. N. J. 1890). Of course this criticism in the text does not apply to the proposition that the contract may be avoided for previous *fraudulent* statements of the insured, inducing the contract. McVey *v.* Grand Lodge A. O. U. W., above. The statements of a third person may, with reference to the rules governing representations, have the effect of statements made by the applicant himself, as in case of a policy taken out on the life of another, if the applicant refers the insurer to the insured for information. Everett *v.* Desborough, 5 Bingham, 503 (1829). But this was declared subject to the limitation that the insured is the agent of the applicant only for the purpose of answering such questions as are put by the insurer; that his non-communication of a material fact, as to which he is not questioned, will only vitiate the contract if he knew of such fact and believed it to be material. Rawlins *v.* Desborough, 2 Moody & R. 328 (1840); see Wheelton *v.* Hardisty, 8 El. & Bl. 232 (1857). So the fraudulent statements of the physician and a friend of the applicant were held binding on him. Miller *v.* Mutual Benefit Co., 31 Iowa, 216, 234 (1871). Compare Mahony *v.* National Widows' Fund, 6 L. R. C. P. 252 (1871).

[2] Gray *v.* National Benefit Assoc., 111 Ind. 531 (1887); Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 665 (1885). This is in reality an application of the rule that the written contract supersedes prior negotiations. See Coolidge *v.* Charter Oak Co., 1 Mo. App. 109, 113 (1876). See also § 20.

[3] Prudential Co. *v.* Ætna Co., 23 Fed. Rep. 438 (1885). Otherwise of a promissory representation contained in the written contract. Schultz *v.* Mutual Co., 6 Fed. Rep. 672 (1881). In Prudential Co. *v.* Ætna Co., the court explain Traill *v.* Baring, 10 Jur. N. S. 318 (1864), as being a case of an untrue representation of an *existing* fact.

promissory representations.[1] It is obvious that, of the statements made by the insured in connection with the negotiations, some will have little or no bearing on the subject of the contract, or will be of so little weight as to have no influence on either party as an inducement or as a discouragement to contract. Such statements being then *immaterial to the risk*, are known as *immaterial representations*. On the other hand, the statements in reliance on which the insurer contracts, are known as *material representations*.[2] Such statements must, however, be untrue in some *material particular* to avoid the contract.

§ 14. **Difference between warranty and material representation in respect to burden of proof.**—The only difference between the *effect* of a warranty and that of a material representation seems to be as to the rule established in some jurisdictions as to the difference between the burden of proof of breach of warranty and the burden of proof of a material misrepresentation This rule is said to rest on the presumption that the parties included as warranties all the conditions on which the liability of the insurer depends. Hence it is said that, while the insured, in order to enforce such liability, is bound to prove the performance of

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[1] Thus where the applicant merely "*declared* that he *would not* practice any pernicious habit that obviously tended to the shortening of life," his failure to carry out such declaration was held not to avoid the contract, notwithstanding a provision therein that if any of the statements or declarations made in the application should be found *in any respect untrue*, the contract should be void, such provision being held to refer to a state of things existing at the date of the contract. Knecht *v.* Mutual Co., 90 Pa. St. 118 (1879). To the contrary, on the same state of facts. Schultz *v.* Mutual Co., 18 Ins. L. J. 171 (1881). And so too where the word "guaranty" was used instead of "declare." Knight *v.* Mutual Co., 9 W. N. C. (Pa.), 501 (1881).

[2] Campbell *v.* New England Mutual Co., 98 Mass. 381, 391, 395 (1867); Price *v.* Phœnix Mutual Co., 17 Minn. 497, 504 (1871); Alabama Gold Co. *v.* Johnston, 80 Ala. 467, 470 (1886).

such conditions, in other words, to show the truth of such warranties, it rests on the insurer to prove the existence and non-performance of other conditions arising from mere representations.[1] Perhaps, inasmuch as the doctrine of material misrepresentations is of itself an anomaly in the law, this distinction is at least as unobjectionable as the doctrine of material misrepresentations. But the weight of authority is decidedly against the distinction, and the prevailing rule is, that the burden of proof of *breach of a warranty* rests on the insurer as well as does the burden of proof of a material misrepresentation.[2] It would seem, however, that

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[1] Price *v.* Phœnix Mutual Co., 17 Minn. 497, 504 (1871); Miller *v.* Mutual Benefit Co., 31 Iowa, 216, 227 (1871); Buford *v.* N. Y. Co., 5 Oreg. 334, 340 (1874); Mutual Benefit Co. *v.* Wise, 34 Md. 582, 597 (1871). See Reid *v.* Piedmont & Arlington Co., 58 Mo. 421, 427 (1874); Cluff *v.* Mutual Benefit Co., 13 Allen (Mass.), 308, 316 (1866); Freeman *v.* Travelers' Co., 144 Mass. 572, 579 (1887); Bon *v.* Railway Passenger Co., 56 Iowa, 664 (1881); Geach *v.* Ingall, 14 Mees. & W. 95 (1845); Neill *v.* Travelers' Co., 7 Ontario App. 570, 579 (1882). The rule was applied in Campbell *v.* New England Mutual Co., 98 Mass. 381, 389 (1867), even though the written contract provided that it should be void "if the statements made by or on behalf of or with the knowledge of the said assured to said company, as the basis of, or in the negotiations for this contract, shall be found in any respect untrue." So in Clapp *v.* Mass. Benefit Assoc., 146 Mass. 519, 531 (1888), holding the burden to be in the insurer to prove the falsity of statements made on knowledge and belief; S. P. Flynn *v.* Mass. Benefit Assoc., 25 Northeastern Rep. 716 (Supm. Ct. Mass. 1890).

[2] Grattan *v.* National Co., 15 Hun, 74, 78 (1878); Jones *v.* Brooklyn Co., 61 N. Y. 79, 86 (1874); Van Valkenburgh *v.* American Popular Co., 70 N. Y. 605 (1877); Piedmont & Arlington Co. *v.* Ewing, 92 U. S. 377 (1875); Northwestern Mutual Co. *v.* Hazelett, 105 Ind. 212, 220 (1885); National Benefit Assoc. *v.* Grauman, 107 Ind. 288 (1886); Continental Co. *v.* Rogers, 119 Ill. 474, 485 (1887); Roach *v.* Kentucky Mutual Co., 28 So. Car. 431, 439 (1888); Dial *v.* Valley Mutual Assoc., 29 So. Car. 560, 580 (1888); Grangers' Co. *v.* Brown, 57 Miss. 308, 315 (1879); Southern Co. *v.* Booker. 9 Heisk. (Tenn.), 606, 630 (1872); Swick *v.* Home Co., 2 Dillon, 160, 166 (1873); United Brethren Soc. *v.* O'Hara, 120 Pa. St. 256, 264 (1888). See, also,

we have here another instance of a plain departure from a well settled doctrine of the common law, namely, that one seeking to enforce a contract must prove the performance of conditions precedent.[1]

§ 15. **Effect of statements in application as warranties.**— The statements made by the insured prior to the contract are commonly found in the *application*, which is usually in writing. The statements in the application are, as we have seen, *representations*. But this rule is subject to a qualification arising out of the well-known rule that a written contract may by incorporation consist of two or more instruments.[2] Thus the policy or certificate which ordinarily embodies the contract, may by reference incorporate all or a part of the statements in the application, so as to make payment by the insurer conditional on the truth, not merely of any statements in the policy or certificate itself, but also on the truth of answers contained in the application, even though it may have been impossible to make such answers correctly. Such statements then become warranties instead of representations.[3] But as the

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Dreier *v.* Continental Co., 24 Fed. Rep. 670 (1885); Trenton Mutual Co. *v.* Johnson, 4 Zabr. (N. J.), 576 (1854).

[1] Sometimes by statute it is made sufficient for the plaintiff suing on a contract to *allege generally* the performance of all conditions on his part. So in National Benefit Assoc. *v.* Bowman, 110 Ind. 355 (1886); Brooklyn Co. *v.* Bledsoe, 52 Ala. 538, 547 (1875); Britt *v.* Mutual Benefit Co., 10 Southeastern Rep. 896 (Supm. Ct. N. C. 1890). See c. 6.

[2] Of course this does not apply to mere verbal representations made at the time of such application. Higbie *v.* Guardian Mutual Co., 53 N. Y. 603, 605 (1873); Mutual Benefit Co. *v.* Robertson, 59 Ill. 123 (1871).

[3] Thus in Cushman *v.* U. S. Co., 67 N. Y. 404 (1875), where the policy provided that it was to be void if any of the statements on the faith of which the policy was issued proved untrue, held, that the policy was avoided by a false statement in the application that applicant had never suffered from liver disease. So in Foot *v.* Ætna Co., 61 N. Y. 571, 576 (1875), held, in case of a provision that the policy should be void

effect of so incorporating the application into the contract is frequently to produce a forfeiture, it is the generally accepted doctrine that there must be a clear purpose that the application be made part of the contract, and if the reference to the application is for another purpose, or when no purpose is indicated to make it part of the contract,

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if any of the statements in the application were *false* or fraudulent, that the word "false" was to be construed as meaning "untrue" and not "fraudulent." Hence, the policy was avoided by proof that any of such statements were *untrue*, though not necessarily *fraudulent*. So held, however, where the *application* provided that any "*untrue* or fraudulent statements" should avoid the policy. Compare Edington *v.* Ætna Co., 77 N. Y. 564, 567 (1879).

The doctrine stated in the text was laid down in the following cases: Ferguson *v.* Mass. Mutual Co., 22 Hun, 322, 325 (1884); Ritzler *v.* World Co., 42 N. Y. Super Ct. 409 (1877); Baker *v.* Home Co., 64 N. Y. 648 (1876); Brennan *v.* Security Co., 4 Daly, 296 (1872); Dwight *v.* Germania Co., 103 N. Y. 341, 347, 349 (1886); Mayer *v.* Equitable Reserve Fund Assoc., 49 Hun, 336 (1888; which see as to effect in such case of asking applicant to state "so far as he knows"); McCollum *v.* Mutual Co., 55 Hun, 103, 107 (1890); Foot *v.* Ætna Co., 61 N. Y. 571, 575 (1875); Vose *v.* Eagle Co., 6 Cush. (Mass.), 42, 47 (1850); Miles *v.* Conn. Mutual Co., 3 Gray (Mass.), 580 (1854); Clapp *v.* Mass. Benefit Assoc., 146 Mass. 519, 528 (1888); Flynn *v.* Mass. Benefit Assoc., 25 Northeastern Rep. 716 (Supm. Ct. Mass. 1890); Archer *v.* Metropolitan Co., 6 W. N. C. (Pa.), 332 (1878); United Brethren Mutual Aid Soc. *v.* White, 100 Pa. St. 12 (1882); Home Mutual Assoc. *v.* Gillespie, 110 Pa. St. 84 (1885); (Conn. Mutual) Co. *v.* Pyle, 44 Ohio St. 19 (1886); Mutual Benefit Co. *v.* Miller, 39 Ind. 475, 484 (1872); Reid *v.* Piedmont & Arlington Co., 58 Mo. 421 (1874); Linz *v.* Mass. Mutual Co., 8 Mo. App. 363, 372 (1880); Kelsey *v.* Universal Co., 35 Conn. 225, 237 (1868); Metropolitan Co. *v.* McTague, 49 N. J. Law, 587 (1887); Glutting *v.* Metropolitan Co., 50 N. J. Law, 287 (1888); Maine Benefit Assoc. *v.* Parks, 81 Me. 79 (1888); Powers *v.* Northeastern Mutual Assoc., 50 Vt. 630 (1878); Day *v.* Mutual Benefit Co., 1 MacArthur (D. C.), 41 (1873); Buford *v.* N. Y. Co., 5 Oreg. 334, 340 (1874); Mutual Benefit Co. *v.* Robertson, 59 Ill. 123 (1871); Thomson *v.* Weems, 9 L. R. App. Cas. 671 (1884). See, under Georgia statute, Southern Co. *v.* Wilkinson, 53 Ga. 535, 549 (1874).

it will not be so treated.[1] There seems, however, in recent decisions a tendency to relax the strictness of this rule in its application to mutual benefit certificates.[2] And where the application becomes part of the contract, yet, ordinarily at least, it contains none of the obligations assumed by the insurer; hence it is not necessary, in an action against the insurer on the contract, for the plaintiff to set out the application as a part of the contract.[3]

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[1] Campbell *v.* New England Mutual Co., 98 Mass. 381, 392 (1867). So in case of mutual benefit certificates. Presbyterian Fund *v.* Allen, 106 Ind. 593 (1886). Where the agreement that the policy should be conditioned on the absolute truth of the statements of applicant, was found in the *proposal and application* only, neither of which was incorporated in the policy, the insured was held not bound by such agreement, it being presumed that the policy superseded the prior negotiations. American Popular Co. *v.* Day, 39 N. J. Law, 89 (1876; so held though the policy declared that the insurance was *in consideration* of the representations made on the application). To similar effect, Alabama Gold Co. *v.* Johnston, 80 Ala. 467, 472 (1886). An applicant having in answer to a question whether he had ever had certain diseases, replied, "see surgeon's report," held, that the surgeon's answers were to have the same effect as if made by applicant. Smith *v.* Ætna Co., 5 Lans. 545, 551; affirmed in 49 N. Y. 211 (1872). But under a rule of the company requiring the applicant to give a reference to some third person from whom information might be obtained respecting the general health and habits of the applicant, a statement made by such person is not of itself a warranty on the part of insured. Rawls *v.* American Mutual Co., 27 N. Y. 282, 294 (1863; where such statement was held no warranty, there being no reference to it in the application, and the applicant not procuring it to be made, and not knowing anything of its contents).

[2] The application and the certificate were construed as one instrument, though the application was not referred to in the certificate. Northwestern Benev. Assoc. *v.* Bloom, 21 Ill. App. 159 (1886); Northwestern Assoc. *v.* Hand, 29 Ill. App. 73 (1887); Hogins *v.* Supreme Council Champions of Red Cross, 76 Cal. 109 (1888).

[3] Britt *v.* Mutual Benefit Co., 10 Southeastern Rep. 896 (Supm. Ct. N. C. 1890). So held, however, in view of the statute allowing a general allegation of performance by the plaintiff of conditions precedent. To same effect, Penn. Mutual Co. *v.* Wiler, 100 Ind. 92 (1884); North-

§ 16. Method of determining whether statements of applicant are warranties or representations.—As the effect of considering a given statement as a *warranty* instead of a *representation* is frequently to produce a *forfeiture* of the rights of the insured under the contract, such a statement will, in case of doubt, be construed to be a representation rather than a warranty.[1] And even where a

western Mutual Co. *v.* Hazelett, 105 Ind. 212 (1885); and see Mutual Benefit Co. *v.* Cannon, 48 Ind. 264, 268 (1874). But held otherwise in the absence, as it seems, of any such statute. Bidwell *v.* Conn. Mutual Co., 3 Sawyer, 261 (1874). See, however, Guardian Mutual Co. *v.* Hogan, 80 Ill. 35, 40 (1875). As to necessity under Pennsylvania statute that copy of application be attached to policy, see New Era Assoc. *v.* Musser, 120 Pa. St. 384 (1888); Norristown Title Co. *v.* Hancock Mutual Co., 132 Pa. St. 385 (1890). A policy or certificate referring to the application as part of it, held inadmissible in evidence without producing the application or accounting for it. Pennsylvania Mutual Co. *v.* Corley, 2 Pennypacker (Pa.), 398, 403 (1882). In Georgia (where by statute it is unnecessary to set out the application in the complaint) a policy is admissible in evidence without the application on which it was issued. Travelers' Co. *v.* Shepherd, 12 Southeastern Rep. 18, 21 (Supm. Ct. Ga. 1890). It was also held unnecessary for the claimant to introduce the application in evidence in Mutual Benefit Co. *v.* Robertson, 59 Ill. 123. 126 (1871); Suppiger *v.* Covenant Mutual Benefit Assoc., 20 Bradw. (Ill.), 595 (1886).

[1] Campbell *v.* New England Mutual Co., 98 Mass. 381, 391 (1867); Moulor *v.* American Co., 111 U. S. 335 (1884); Northwestern Benev. Assoc. *v.* Cain, 21 Ill. App. 471 (1885); Continental Co. *v.* Thoena, 26 Ill. App. 495 (1887); Price *v.* Phœnix Mutual Co., 17 Minn. 497, 504, 506 (1871); Miller *v.* Mutual Benefit Co., 31 Iowa, 216, 228 (1871); Alabama Gold Co. *v.* Johnston, 80 Ala. 467, 471 (1886); Vivar *v.* Supreme Lodge Knights of Pythias, 20 Atlantic Reporter, 36 (Supm. Ct. N. J. 1890). See also Schaible *v.* Washington Co., 9 Phila. (Pa.), 136 (1873); Britton *v.* Royal Arcanum, 46 N. J. Eq. 102, 106 (1889). Thus the language used was held insufficient to create a warranty in Campbell *v.* New England Mutual Co., 98 Mass. 381, 393 (1867), where the policy provided that it should be void "if the statements made by or on behalf of or with the knowledge of the said assured to said company *as the basis of, or in the negotiations for* this contract, shall be found in any respect untrue." This decision was followed on a very similar state of

given statement is determined to be a warranty, it will be strictly construed, and will not be extended to include

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facts in Price *v.* Phœnix Mutual Co., 17 Minn. 497, 511 (1871); Miller *v.* Mutual Benefit Co., 31 Iowa, 216, 229 (1871); Mutual Benefit Co. *v.* Wise, 34 Md. 582, 597 (1871); Conover *v.* Mass. Mutual Co., 3 Dillon, 217 (1874). So held no warranty where the policy provided that the contract was *in consideration of* the representations made on the application. American Popular Co. *v.* Day, 39 N. J. Law, 89 (1876); S. P., Alabama Gold Co. *v.* Johnston, 80 Ala. 467, 473 (1886). So held no warranty in Anders *v.* Supreme Lodge Knights of Honor, 51 N. J. Law, 175 (1889; where it was declared that in the answers there were "no misrepresentations or suppression of known facts"); Vivar *v.* Supreme Lodge Knights of Pythias, 20 Atlantic Reporter, 36 (Supm. Ct. N. J. 1890; where the statements were designated as "representations"); Phœnix Co. *v.* Raddin, 120 U. S. 183, 189 (1887; where the answers of applicant were declared to be "fair and true answers," and "*to form the basis of* the contract of insurance," also to be "the declarations or statements *on the faith of which* the contract was made"). In Fowkes *v.* Manchester and London Assoc., 3 Best and Smith, 917 (1863), where the statements were declared to be "correct and true throughout," and it was declared that "if it should appear that any fraudulent concealment or designedly untrue statement be contained therein, then" the contract should be void, held, to avoid the contract, a statement must be *designedly* untrue. See also Confederation Co. *v.* Miller, 14 Canada Supm. Ct. 330 (1887). In Southern Co. *v.* Booker, 9 Heisk. (Tenn.), 606, 627 (1872), where the answers were declared to be fair and true, and it was agreed that the statements of applicant should form the basis of the contract, and that any untrue or fraudulent answers, or any suppression of facts in regard to his health, would render the policy void, held, no warranty. It seems assumed that this provision did not create an absolute warranty, as the decision was on the question of *materiality*.

Co-operative Assoc. *v.* Laflore, 53 Miss. 1, 17 (1876), goes, perhaps, farther than any other case in construing language to import a warranty, rather than a representation. The policy provided that if any *fraud* should be committed against the insurer in the statements made in the application, "and *upon the faith of which* this policy is issued," the policy should be null and void. It was held that the statements in the application were so referred to as to become warranties, and that the word fraud embraced *misstatements by which the insurer had been deceived, though not fraudulently intended by the applicant.*

anything not necessarily included in its terms.[1] This is partly on the ground that that construction of a contract is to be preferred that avoids a forfeiture, and partly on the ground of the language of the written contract having been (as is commonly the case) prepared by the insurer. Even the description of a statement in the contract as a warranty does not necessarily determine it to be a warranty, if the explanations accompanying the term show that a strict warranty was not intended.[2]

§ 17. **Immaterial statements when made material by agreement.**—In case of a warranty, the contract is conditioned on the absolute truth of the statement, whether made in good faith or not, and the question whether such statement is or is not material, is not involved.[3] But in

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[1] Dilleber *v.* Home Co., 69 N. Y. 256, 263 (1877); Mowry *v.* World Mutual Co., 7 Daly, 321 (1877).

[2] Fitch *v.* American Popular Co., 59 N. Y. 557, 566 (1875; where it was also stated in the contract that nothing but fraud or intentional misstatements should avoid the policy, and that payment would be contested only in case of fraud); Moulor *v.* American Co., 111 U. S. 335, 342 (1884; where the word *warranted* was used in the *application* only, and in the policy itself the statements were characterized as *representations*); Continental Co. *v.* Rogers, 119 Ill. 474, 482 (1887; where it was stated in the contract that it should be void if obtained by any fraud, misrepresentation or concealment); Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 654 (1885; where, though the contract stated that the answers were *warranted* and represented to be correct, it also stated that the contract should be void if the answers and statements were *in any material respect* untrue or false, or tended to deceive the insurer). Nor does the description of a statement as a "condition" necessarily make it a warranty. Campbell *v.* New England Mutual Co., 98 Mass. 381, 394 (1867).

[3] Cazenove *v.* British Equitable Co., 28 L. J. C. P. 259; 29 Id. 160 (1860); Barteau *v.* Phœnix Mutual Co., 67 N. Y. 595 (1876); Cushman *v.* U. S. Co., 67 N. Y. 404, 408 (1875); Continental Co. *v.* Rogers, 119 Ill. 474, 482 (1887); Wilkinson *v.* Conn. Mutual Co., 30 Iowa, 119, 125 (1870); Anderson *v.* Fitzgerald, 4 House of Lords Cases, 484 (1853). Here a policy, after setting forth several warranties, provided: "If

many cases where the language of the contract is regarded as insufficient to create a warranty, it is regarded as sufficient to create an agreement that a statement, of itself immaterial, is to be regarded as *material;* that is to say, as a material representation.[1] This commonly happens in case

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anything so warranted as aforesaid shall not be true, or if any circumstance material to the risk shall not have been truly stated, or shall have been misrepresented or concealed, or shall not have been fully and fairly disclosed and communicated to the said company, *or any false statements made to them in or about the obtaining or effecting of this insurance*, this policy shall become forfeited." Held that it was error to leave it to the jury whether the answers of applicant were material as well as false. And in such case the forfeiture results, though neither the application nor the policy contain any clause expressly providing for a forfeiture on that account. Foot *v.* Ætna Co., 61 N. Y. 571, 576 (1875).

This fundamental doctrine was lost sight of in Southern Co. *v.* Booker, 9 Heisk. (Tenn.), 606, 627 (1872), where the court, in determining the question whether the statements in question were *warranties* or *representations*, assumed that the question depended on whether the statements were *material* or *immaterial.* This was obviously inconclusive, as the statements, though material, might still have been representations, and, though immaterial, might (by express agreement) have been (or had the effect of being) warranties. Indeed, the question before the court was not whether the statements were *true* or *untrue*, but whether they were *material* or *immaterial.* Under the language of the contract, however, it might well have been decided that the statements were *representations*, not *warranties*, though the effect of this language was ignored in the decision. Similarly in Buell *v.* Conn. Mutual Co., 2 Flippin, 9 (1877), where the question, or at least the preliminary question, to decide was, whether, under the provisions of the contract, it was not avoided by any *untruth*, the court, ignoring this question, decide the case as if the only question were one of *materiality* or immateriality.

[1] Campbell *v.* New England Mutual Co., 98 Mass. 381, 401 (1867); Cobb *v.* Covenant Mutual Assoc., 26 Northeastern Rep. 230 (Supm. Ct. Mass. 1891); Jeffries *v.* Economical Co., 22 Wall. 47 (1874); Ætna Co. *v.* France, 91 U. S. 510 (1875); (Knickerbocker) Co. *v.* Trefz, 104 U. S. 197, 202 (1881); Phœnix Co. *v.* Raddin, 120 U. S. 183, 189 (1887); Valton *v.* National Fund Co., 20 N. Y. 32, 37 (1859); Mutual Benefit Co. *v.* Miller, 39 Ind. 475, 486 (1872); Whitmore *v.* Supreme Lodge Knights of Honor, 100 Mo. 36 (1889); Ball *v.* Granite State Assoc., 64 N. H. 291.

of an answer made to a specific inquiry made by the insurer, the fact of his asking it being regarded as sufficient to show that he regards the answer as a material representation, and the assent of the insured that it be so regarded is sufficiently shown by his making the answer.[1] But there is authority for the seemingly reasonable proposition that it is not universally true that the materiality of a representation will be inferred from the fact that it was made pending the negotiations in response to a specific inquiry by the insurer; that the purpose of the inquiry must be considered, to see whether the information is sought to aid the insurer in fixing the terms on which he will contract, or with an entirely different object.[2]

(1886); Alabama Gold Co. *v.* Garner, 77 Ala. 210, 215 (1884); Co-operative Assoc. *v.* Leflore, 53 Miss. 1, 15 (1876); Hoffman *v.* Supreme Council American Legion of Honor, 35 Fed. Rep. 252 (1888); Swick *v.* Home Co., 2 Dillon, 160, 165 (1873). Compare Hartman *v.* Keystone Co., 21 Pa. St. 466, 477 (1853). And in such case it is error to leave to the jury the question whether the statements were material. Campbell *v.* New England Mutual Co., above, and other cases, above. Where the statements were by express agreement made material, held not error to charge the jury, in an action on the contract, that they must find for the insurer if they believed the statements to be *essentially* untrue. In such case the word *essentially* is to be regarded as synonymous with *strictly*. Hoffman *v.* Supreme Council American Legion of Honor, 35 Fed. Rep. 252 (1888).

[1] Miller *v.* Mutual Benefit Co., 31 Iowa, 216, 232 (1871); Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 655 (1885); Conover *v.* Mass. Mutual Co., 3 Dillon, 217 (1874). Otherwise of an answer not directly responsive to any question. Buell *v.* Conn. Mutual Co., 2 Flippin, 9 (1877). But if one of the parties wishes to make material, what is of itself immaterial, he must communicate his intention *prior to the contract*. Washington Co. *v.* Haney, 10 Kans. 525, 538 (1873).

[2] Vivar *v.* Supreme Lodge Knights of Pythias, 20 Atlantic Rep. 36 (Supm. Ct. N. J. 1890), holding that where the inquiry related merely to the payee of the insurance money, the statement in reply as to the relationship of the payee to the insured was immaterial.

§ 18. **Omissions to answer and partial answers.**—It has been properly held that the mere omission of the applicant to state matter not called for by any specific or general question, does not affect the validity of the contract.[1] But the effect of omission to answer a question put by the insurer depends on circumstances. Where an answer of the applicant to a direct question purports to be a complete answer, any material misstatement or omission in the answer avoids the contract. But where on the face of the application a question appears not to be answered at all or to be imperfectly answered, and the contract is made without further inquiry on the part of the insurer, the want or imperfection does not avoid the contract.[2]

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[1] Rawls *v.* American Mutual Co., 27 N. Y. 282, 294 (1863); Mallory *v.* Travelers' Co., 47 N. Y. 52, 56 (1871); Mutual Benefit Co. *v.* Robertson, 59 Ill. 123, 128 (1871); London Assurance *v.* Mansel, 11 L. R. Ch. D. 363 (1878). See Cheever *v.* Union Central Co., 4 Am. L. Rec. (Cin. Ohio), 155, 160 (1875); Humphreys *v.* National Benefit Assoc., 20 Atlantic Rep. 1047 (Supm. Ct. Pa. 1891). In Lindenau *v.* Desborough, 3 Manning & Ryland, 45 (1828), it was laid down that the contract would be avoided by failure of the applicant to disclose a material fact, though in the opinion of the applicant such fact was not material, and though there was no question to which a disclosure of such fact would be directly responsive. There was, however, this general question: "Is there any circumstance within your knowledge which the directors ought to be acquainted with?," which was answered in the negative. A similar doctrine was laid down in Abbott *v.* Howard, Hayes (Irish), 381 (1832). As to effect of provision invalidating the contract in case of it appearing "that any material information has been wilfully withheld," see Russell *v.* Canada Co., 8 Ontario App. 716 (1883); or "that any circumstance important for" the insurer to know "shall have been withheld." Sceales *v.* Scanlan, 6 Irish L. R. 367 (1843).

[2] Phœnix Co. *v.* Raddin, 120 U. S. 183, 190 (1887; where the omission to disclose unsuccessful applications for additional insurance was held not to avoid the contract); Miller *v.* Phœnix Mutual Co., 107 N. Y. 292, 301 (1887; where there was a question as to what was age of insured, but he made no material statements whatsoever on the subject); American Co. *v.* Mahone, 56 Miss. 180, 192 (1878); Penn Mutual Co. *v.* Wiler, 100 Ind. 92, 98 (1884); Edington *v.* Mutual Co., 67

§ 19. **Effect of false statement made in good faith.**—In case of a false statement made by the applicant as to a material matter, but in good faith and under the supposition that it is true, the contract is avoided, consistently with the equitable rule that as between two innocent parties a loss should fall on the one whose act produced such loss.[1] This rule is equally applicable to warranties

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N. Y. 185, 198 (1876); Dilleber *v.* Home Co., 69 N. Y. 256, 262 (1877; where, in answer to request to give names of any physicians that had been employed by insured, he named only one of two that had been so employed. So held, though the answers were warranted "to be full"). It is doubtful, however, whether Perrins *v.* Marine & General Travelers' Soc., 2 El. & El. 317 (1859), can be sustained even on this principle. There, in answer to a question what was his profession or occupation, the applicant described himself as "esquire," but omitted to state the fact that he was an *ironmonger*. The contract was held not avoided. Compare Flynn *v.* Equitable Co., 78 N. Y. 568, 579 (1879); Fitch *v.* American Popular Co., 59 N. Y. 557, 572 (1875); Mowry *v.* World Mutual Co., 7 Daly, 321 (1877).

The same doctrine has been applied to an *equivocal* answer. Higgins *v.* Phœnix Mutual Co., 74 N. Y. 6 (1878; where, in answer to a question as to what physician had been employed, answer "refer to Dr. T.," was held not to constitute a warranty that T. had been so employed).

[1] Grattan *v.* National Co., 15 Hun, 74, 78 (1878); Campbell *v.* New England Mutual Co., 98 Mass. 381, 396 (1867); Mutual Benefit Co. *v.* Cannon, 48 Ind. 264, 269 (1874); Hartwell *v.* Alabama Gold Co., 33 La. Ann. 1353 (1881); Morgan *v.* Bloomington Mutual Assoc., 32 Ill. App. 79 (1889); Vose *v.* Eagle Co., 6 Cush. (Mass.), 42, 48 (1850); Co-operative Assoc. *v.* Leflore, 53 Miss. 1, 18 (1876; where the word "fraud" was declared to embrace all statements untrue in fact, as well as those deliberately fraudulent); MacDonald *v.* Law Union Co., 9 L. R. Q. B. 328 (1874); Duckett *v.* Williams, 4 Tyrwhitt, 240 (1834). But to the contrary as to ignorance and good faith, Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 655 (1885; where, however, it is held that the policy will be avoided by mere *legal* fraud as distinguished from *actual* fraud). See Texas Mutual Co. *v.* Davidge, 51 Tex. 244 (1879); Union Central Co. *v.* Cheever, 36 Ohio St. 201 (1880).

Of course the belief on the part of the applicant that a material statement is in fact immaterial, will not prevent the falsity of it from

and to material representations. But it is subject to the obvious exception of cases where the applicant simply states what is his *belief* or *supposition*,[1] and, especially in recent cases, there is a tendency to limit very strictly the application of the rule.[2]

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avoiding the contract. Von Lindenau *v.* Desborough, 3 Carrington & P. 353 (1828).

[1] A statement that the applicant "*was not aware* of any disorder or circumstance tending to shorten his life or render an insurance on his life more than usually hazardous," held not falsified by proof of the existence of disorders known by him to exist, but honestly believed by him to have no effect to shorten his life or render an insurance on it more than usually hazardous. Jones *v.* Provincial Co., 3 C. B. N. S. 65 (1857). So where it was provided that "if anything averred in the declaration forming the basis of the assurance or in the relative documents be untrue, this policy and assurance shall be void," but it was also stated that the answers were "faithful and true," the contract was held not avoided by unintentional misstatements. Life Assoc. of Scotland *v.* Foster, 11 Scotch Session Cases, 3d series, 351 (1873). So where the declarations that would otherwise have constituted a warranty were qualified by the statement that these declarations were true to "the best of his knowledge and belief." Confederation Co. *v.* Miller, 14 Canada Supm. Ct. 330 (1887). And where the declaration was that the statements were "*true* and fair answers to the foregoing questions, in which there is no misrepresentation or suppression of *known* facts; and I acknowledge and agree that the above statement shall form the basis of the agreement," held that it was not falsified by unintentional misstatement. Masons' Benev. Soc. *v.* Winthrop, 85 Ill. 537 (1877).

[2] Moulor *v.* American Co., 111 U. S. 335 (1884; where the word "true," as applied to the answers of applicant concerning the state of his health was interpreted as meaning "honest, sincere, not fraudulent"); Alabama Gold Co. *v.* Johnston, 80 Ala. 467, 473 (1886; applying same rule to word "untrue"). In Washington Co. *v.* Haney, 10 Kans. 525, 540 (1873), it is said of the policy in that case: "While the policy for its validity requires truthfulness in the statements of the application, it is enough if they are true according to the degree and conditions of truthfulness required by the application." A statement in the contrac that the statements and declarations therein were "in all respects true," and that any untrue or fraudulent statements would avoid the policy, held, taken in connection with another statement, that the statements were "true to *the best of the knowledge and belief*" of applicant, not to

§ 20. Effect of knowledge on the part of agent of insurer, of falsity of statement by applicant.—If the insured conditions the contract on the absolute truth of a certain statement, there seems no sound reason why the forfeiture of the contract for the untruth of such statement should be prevented, merely because the insurer or his agent knows such statement to be false.[1] Especially is this so, in view of the rarity of the cases in which such a state of circumstances can exist, apart from either fraudulent intent or gross carelessness on the part of the applicant. And (if we concede the soundness of the doctrine of material representations), there seems no reason why the same rule should not apply to material representations.[2] And at any rate

avoid the policy by reason of the untruth of statements made in the belief that they were true. Clapp *v.* Mass. Benefit Assoc., 146 Mass. 519 (1888). See Cobb *v.* Covenant Mutual Assoc., 26 Northeastern Rep. 230 (Supm. Ct. Mass. 1891). So where there was a declaration that the policy should be void if any of the statements were false or fraudulent, and also a declaration that the statements were "as near correct as applicant could remember." Ætna Co. *v.* France, 94 U. S. 561, 565 (1876). See also Schaible *v.* Washington Co., 9 Phila. (Pa.), 136 (1873).

[1] That knowledge on the part of the agent of the insurer, of the falsity of a warranty, will not relieve the insured from a forfeiture of the contract, was held in Kenyon *v.* Knights Templars Assoc., 122 N. Y. 247, 257 (1890); Barteau *v.* Phœnix Mutual Co., 67 N. Y. 595 (1876); Foot *v.* Ætna Co., 61 N. Y. 571, 576 (1875); Vose *v.* Eagle Co., 6 Cush. (Mass.), 42, 49 (1850); Galbraith *v.* Arlington Mutual Assoc., 12 Bush (Ky.), 29 (1876); Westropp *v.* Bruce, Batty (Irish), 155 (1826). To the contrary, Miller *v.* Mutual Benefit Co., 31 Iowa, 216, 223, 235 (1871); Cotten *v.* Fidelity and Casualty Co., 41 Fed. Rep. 506, 510 (1890); and see Coolidge *v.* Charter Oak Co., 1 Mo. App. 109, 115 (1876); Humphreys *v.* National Benefit Assoc., 20 Atlantic Rep. 1047 (Supm. Ct. Pa. 1891). That such knowledge must be pleaded to be available, see Texas Mutual Co. *v.* Davidge, 51 Tex. 244 (1879). As to evidence of agency of "instituting officer" of benefit organization, see Supreme Council American Legion of Honor *v.* Green, 71 Md. 263, 271 (1889). As to effect of information obtained from inquiries made by the agent, of outside parties, see Russell *v.* Canada Co., 11 Ontario App. 716 (1883).

[2] So held of a misrepresentation. Vose *v.* Eagle Co., 6 Cush.

the insurer is not bound by such knowledge of the agent where the authority of the agent in this respect is limited by express notice to the insured.[1]

§ 21. Effect of agent of insurer inserting in written contract statement at variance with facts furnished him by applicant.— The doctrine that a written contract supersedes prior negotiations is conspicuously departed from in the rule that allows the defense of misrepresentation or breach of warranty to be overcome by proof that the statement in question, as it appears in the written contract, was not in reality assented to by the insured. But notwithstanding the anomaly, it is a doctrine sustained by the overwhelming weight of authority, that, if the applicant lays before the agent taking the application a statement of facts that is wholly true, it cannot afterward be objected by the insurer that any statement in the application dictated or written by the agent acting upon such true statement of facts was untrue.[2] Ordinarily, however, the medical examiner em-

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(Mass.), 42, 49 (1850). To the contrary, Newman *v.* Covenant Mutual Assoc., 76 Iowa, 56, 63 (1888).

[1] So where the contract provided that the agent could not waive or alter any of the conditions in question. Cook *v.* Standard Co., 47 Northwestern Rep. 568 (Supm. Ct. Mich. 1890).

[2] In some jurisdictions this doctrine is denied, and oral testimony held inadmissible in an action at law to show that untrue representations were inserted in the application by the agent, acting on a true oral statement by the applicant. McCoy *v.* Metropolitan Co., 133 Mass. 82 (1882). See Plympton *v.* Dunn, 148 Mass. 523 (1889). And the objections to the prevailing doctrine are stated with unanswerable force in Franklin (Fire) Co. *v.* Martin, 40 N. J. Law, 568, 578 (1878). But the following decisions hold to the doctrine as stated in the text: Higgins *v.* Phœnix Mutual Co., 74 N. Y. 6, 10 (1878); Baker *v.* Home Co., 64 N. Y. 648 (1876); McArthur *v.* Globe Mutual Co., 14 Hun, 348 (1878); Boos *v.* World Mutual Co., 6 T. & C. (N. Y.), 364; affirmed in 64 N. Y. 236 (1875); Mowry *v.* Rosendale, 74 N. Y. 360, 363 (1878); Wilder *v.* Preferred Mutual Accident Assoc., 14 N. Y. State Reporter, 365 (1888); O'Brien *v.* Home Benefit Society, 117 N. Y. 310, 318 (1889); Miller *v.*

ployed by the insurer is not regarded as its agent for this purpose,[1] though it is otherwise if he has authority to take the application.[2]

Phœnix Mutual Co., 107 N. Y. 292, 296, 301 (1887); Kenyon *v.* Knights Templar Aid Assoc., 48 Hun, 278, 282 (1888); affirmed in 122 N. Y. 247 (1890); Bentley *v.* Owego Mutual Benefit Assoc., 23 N. Y. State Reporter, 470 (1889); (Union Mutual) Co. *v.* Wilkinson, 13 Wall. 222 (1871); New Jersey Mutual Co. *v.* Baker, 94 U. S. 610 (1876); Lueders *v.* Hartford Co., 12 Fed. Rep. 465 (1882); Sawyer *v.* Equitable Accident Co., 42 Fed. Rep. 30 (1890); (Conn. Mutual) Co. *v.* Pyle, 44 Ohio St. 19 (1886); Continental Co. *v.* Thoena, 26 Ill. App. 495 (1887); McArthur *v.* Home Assoc., 73 Iowa, 336 (1887); Gray *v.* National Benefit Assoc., 111 Ind. 531 (1887); McCall *v.* Phœnix Mutual Co., 9 W. Va. 237 (1876); Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 663 (1885); Mutual Benefit Co. *v.* Daviess, 87 Ky. 541, 548 (1888); Temmink *v.* Metropolitan Co., 72 Mich. 388 (1888); Kansas Protective Union *v.* Gardner, 41 Kans. 397 (1889); Follette *v.* U. S. Mutual Accident Assoc., 12 Southeastern Rep. 370 (Supm. Ct. N. C. 1890); American Co. *v.* Mahone, 56 Miss. 180, 191 (1878); Equitable Co. *v.* Hazlewood, 75 Tex. 338 (1889); Keystone Assoc. *v.* Jones, 20 Atlantic Rep. 195 (Ct. of App. of Md. 1890); Metropolitan Co. *v.* Harper, 5 Reporter, 490 (1878); Wilkinson *v.* Union Mutual Co., 2 Dillon, 570 (1872). So held of a *sub-agent* of the insurer. Langdon *v.* Union Mutual Co., 14 Fed. Rep. 272 (1882). See Brown *v.* Metropolitan Co., 65 Mich. 306 (1887); Alabama Gold Co. *v.* Garner, 77 Ala. 210 (1884). Even where the answer as written by the agent was subsequently read to the applicant and signed by him, held that the insurer could not set up the untruth. (American) Co. *v.* Mahone, 21 Wall. 152 (1874). But the applicant is presumably acquainted with the contents of the application signed by him, and his want of information thereof must be affirmatively proved. Nor is the fact that the paper was written out by another, sufficient to show such want of information. Hartford Co. *v.* Gray, 91 Ill. 159 (1878). Where the agent forwarded to the insurer a spurious application, instead of the application actually made, the insurer was not allowed to rescind the contract. Massachusetts Co. *v.* Eshelman, 30 Ohio St. 647 (1876). Where an application showed on its face that the contract was to enure to the benefit of the agent procuring the insurance, the insurer was held presumptively bound by the representations contained in it. Fairchild *v.* Northeastern Mutual Assoc., 51 Vt. 613, 626 (1879).

[1] Flynn *v.* Equitable Co., 67 N. Y. 500 (1876). See, however, Lueders *v.* Hartford Co., 12 Fed. Rep. 465 (1882).

[2] Flynn *v.* Equitable Co., 78 N. Y. 568, 573 (1879); Grattan *v.*

§ 22. **The same; limitations on this doctrine.**—This rule is, however, subject to the obvious limitation that if the applicant, knowing the presence of the untrue answer by having read it or otherwise, afterward certifies to its truth, the insurer may set up the untruth.[1] So, too, where the contract expressly provides that no statements made to the agent, but not transmitted to the insurer, shall be binding upon it;[2] and so generally where the insured expressly assumes responsibility for the truth of his statements.[3]

Metropolitan Co., 80 N. Y. 281, 294 (1880); Equitable Co. *v.* Hazlewood, 75 Tex. 338 (1889); Conn. General Co. *v.* McMurdy, 89 Pa. St. 363 (1879); Pudritzky *v.* Supreme Lodge Knights of Honor, 76 Mich. 428 (1889). Compare Taylor *v.* Mutual Benefit Co., 10 Hun, 52 (1877); Britton *v.* Mutual Benefit Co., 3 T. & C. (N. Y.), 442 (1874).

[1] Grattan *v.* Metropolitan Co., 92 N. Y. 274, 283 (1883). And where the applicant signed the application without reading it, he was held bound. Ryan *v.* World Co., 41 Conn. 168, 172 (1874). This is probably, however, opposed to the current of authority.

[2] N. Y. Co. *v.* Fletcher, 117 U. S. 519 (1886). See Sawyer *v.* Equitable Accident Co., 42 Fed. Rep. 30 (1890). And the insurer was held not bound by *fraudulent* insertions by the agent. Ryan *v.* World Co., 41 Conn. 168 (1874). But this is contrary to the weight of authority. See cases cited in § 21, note 2, p. 38.

[3] Thus, where it was stated that the insured adopted as his own each of the statements made in the application "whether written by his own hand or not." Wilkens *v.* Mutual Reserve Fund Assoc., 54 Hun, 294 (1889). So where it was stated on the back of the application that "no agent has power to bind the company by receiving any representations or information not contained in the application for this policy." McCollum *v.* Mutual Co., 55 Hun, 103 (1889). So where it was "agreed and warranted that the application had been made, prepared and written by the applicant, or by his own proper agent, and that the assurer is not to be taken to be responsible for its preparation, or for anything contained therein, or omitted therefrom." Kabok *v.* Phœnix Mutual Co., 4 N. Y. Suppl. 718 (1889). But a provision that "the agent securing the application should be deemed the agent of the applicant only," was declared applicable only to such an agent as can be the agent of the applicant, without at the same time being the agent of the insurer, as, for instance, a mere broker or soliciting agent, who does not in the act of solicitation

§ 23. **Effect of statements made by insurer prior to the contract.**—The doctrine that the written contract supersedes prior negotiations has been more consistently applied to statements on the part of the *insurer*.[1] Thus pamphlets and prospectuses issued by the insurer have been held inadmissible to control the effect of a written contract of insurance.[2]

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represent the insurer. Bushaw *v.* Women's Mutual Co., 8 N. Y. Suppl. 423 (1889). And under the Iowa statute, the applicant is not affected by any such limitations contained in the application or policy. See Continental Co. *v.* Chamberlain, 132 U. S. 304 (1889); Cook *v.* Federal Assoc., 74 Iowa, 746 (1887); Newman *v.* Covenant Mutual Assoc., 76 Iowa, 56, 62 (1888); McConnell *v.* Iowa Mutual Accident Assoc., 79 Iowa, 757 (1889).

[1] Thus in (Union Mutual) Co. *v.* Mowry, 96 U. S. 544 (1877); Thompson *v.* Knickerbocker Co., 104 U. S. 252 (1881); Mobile Co. *v.* Pruett, 74 Ala. 487, 497 (1883).

[2] Ruse *v.* Mutual Benefit Co., 23 N. Y. 516, 518 (1861; prospectus delivered to insured before the application held inadmissible to control provision for forfeiture on failure to pay premiums). The same was held in another action between the same parties on another policy. Mutual Benefit Co. *v.* Ruse, 8 Ga. 534, 542 (1850). Compare MacIntyre *v.* Cotton States Co., 82 Ga. 478, 494 (1889). As to such effect of a prospectus, the court, in a subsequent decision in the Ruse case, indicated a disposition to re-examine this question in view of the English cases. 24 N. Y. 653 (1862). But in Fowler *v.* Metropolitan Co., 116 N. Y. 389, 397 (1889), the decision in 23 N. Y. was reaffirmed, and the doctrine asserted that no contemporary publication can be imported into a policy to vary its terms; that consequently the terms of a pamphlet distributed by the insurer in the course of its business could not be allowed to modify the provision in the contract for forfeiture for nonpayment of premium. So printed prospectuses were held inadmissible to control the terms of the policy in Smith *v.* National Co., 103 Pa. St. 177, 184 (1883; where the prospectus referred to the policies as "nonforfeitable"); Knickerbocker Co. *v.* Heidel, 8 Lea (Tenn.), 488, 497 (1881). So a volume entitled "The Principles and Practice of Life Insurance" was held properly excluded, in an action on the contract, as evidence for the insurer, in the absence of evidence that the matter contained therein had been practically adopted by it in the course of its business transactions. Mutual Co. *v.* Bratt, 55 Md. 200 (1880). See also Continental

§ 24. **Consummation of the contract.**—As in case of contracts generally, there may be a binding contract to insure, though the contract of insurance itself never becomes consummated.[1] In such case it would seem that recovery may be had for breach of the contract to insure, for the same damages as would have been allowed in an action on the contract of insurance.[2] The contract of insurance itself being evidenced by the policy or certificate, the contract ordinarily becomes complete on the delivery of such policy or certificate, and not before;[3] but obviously this effect can be controlled by agreement of the parties. Thus, by agreement, express or implied, the contract may be complete even before the delivery of the policy or certificate,[4] and, on the other hand, the contract

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Co. *v.* Hamilton, 41 Ohio St. 274 (1884). But to the contrary seems Wood *v.* Dwarris, 11 Exch. 493 (1856); also Walsh *v.* Ætna Co., 30 Iowa, 133, 146 (1870), where circulars and books issued by insurer were held admissible against it as in the nature of publications to the world of the rules governing its business, though insured had no knowledge of them, and was not influenced by them in dealing with insurer. And in Southern Mutual Co. *v.* Montague, 84 Ky. 653 (1887), a pamphlet exhibited at the time of the execution of the policy was held admissible to control the terms of the policy. This was, however, in a proceeding in equity to issue a paid-up policy in accordance with the provisions of the pamphlet. So in Collett *v.* Morrison, 9 Hare, 162 (1851), a suit in equity. See also Wheelton *v.* Hardisty, 8 El. & Bl. 232 (1857); Smith *v.* St. Louis Mutual Co., 2 Tenn. Ch. 727, 731 (1877). The reading to the jury of a pamphlet containing instructions to agents of insurer, and commenting thereon to the jury, held ground for new trial. Union Central Co. *v.* Cheever, 36 Ohio St. 201 (1880).

[1] The right to specific performance of a contract to insure was declared in Standley *v.* Northwestern Mutual Co., 95 Ind. 254, 258 (1883).

As to effect of temporary policy, see Kennedy *v.* N. Y. Co., 10 La. Ann. 809 (1855).

[2] So held in Rhodes *v.* Railway Passenger Co., 5 Lans. 71, 75 (1871).

[3] See notes pp. 43, 44.

[4] See note 3, p. 43.

is not necessarily consummated by delivery of the policy or certificate, where it appears that it was not the intention of the parties to so consummate it.[1] Of course the mere application is of itself insufficient to create any contract, and may be withdrawn by the applicant before acceptance by the insurer.[2] As in case of other contracts, the contract is consummated on the unconditional acceptance of the application by the insurer;[3] though, if the acceptance

[1] Markey *v.* Mutual Benefit Co., 103 Mass. 78 (1869; where there was evidence to show that the policy was handed for inspection only); 118 Mass. 178 (1875); S. P. Heiman *v.* Phœnix Mutual Co., 17 Minn. 153 (1871). The right of one receiving a policy from an agent conditionally, to surrender it on a breach of the condition, was asserted in Harnickell *v.* N. Y. Co., 111 N. Y. 390 (1888). As to sufficiency of evidence to show offer of policy followed by acceptance within reasonable time, see Markey *v.* Mutual Benefit Co., 103 Mass. 78, 91 (1869). Evidence held insufficient to show a consummated contract of insurance. Watkins *v.* Bowers, 119 Mass. 383 (1876); (Mutual) Co. *v.* Young, 23 Wall. 85 (1874); Myers *v.* Keystone Mutual Co., 27 Pa. St. 268 (1856); Collins *v.* Ins. Co., 7 Phila. (Pa.), 201 (1870); Covenant Mutual Assoc. *v.* Conway, 10 Bradw. (Ill.), 348 (1882); Schwartz *v.* Germania Co., 18 Minn. 448 (1872); Alabama Gold Co. *v.* Mayes, 61 Ala. 163 (1878); Conn. Mutual Co. *v.* Rudolph, 45 Tex. 454 (1876); Kohen *v.* Mutual Reserve Fund Assoc., 28 Fed. Rep. 705 (1886); Confederation Assoc. *v.* O'Donnell, 10 Canada Supm. Ct. 92 (1882); 13 Id. 218 (1886); Sun Co. *v.* Wright, 15 Ontario App. 704 (1888); Rose *v.* Medical Invalid Co., 11 Scotch Session Cases, 2d series, 151 (1848).

[2] Globe Mutual Co. *v.* Snell, 19 Hun, 560 (1880).

[3] The contract held consummated on the receipt and acceptance by the insurer of the application forwarded by mail, though the applicant had not been advised of its acceptance. Kentucky Mutual Co. *v.* Jenks, 5 Ind. 96 (1854). So a policy mailed to and received by the agent of the insurer, but not received by the applicant, was held to create a binding contract. Yonge *v.* Equitable Co., 30 Fed. Rep. 902 (1887). So where the policy was *mailed* to the agent. Shattuck *v.* Mutual Co., 7 Reporter, 171 (1878). As to sufficiency of contract for insurance without delivery of policy or certificate, see Lorscher *v.* Supreme Lodge Knights of Honor, 72 Mich. 316 (1888); Schwartz *v.* Germania Co., 21 Minn. 215 (1875); Southern Co. *v.* Kempton, 56 Ga. 339 (1876); Cooper *v.* Pacific Mutual Co., 7 Nev. 116 (1871); (Mutual

is conditional,[1] the consummation is postponed until performance of the condition, as, for instance, that the policy be countersigned by an agent of the insurer,[2] or that the first premium be paid by the insured.[3] An act on the

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Benefit) Co. *v.* Higginbotham, 95 U. S. 380 (1877). The acceptance by the insurer of the application does not complete the contract so as to bind the *applicant*, until he has had an opportunity to examine the policy and has assented to its terms. King *v.* U. S. Co., 20 N. Y. Weekly Dig. 203.

[1] As to notice of limitation on authority of agent of insurer to consummate contract, see Cotton States Co. *v.* Scurry, 50 Ga. 48 (1873). A contract of insurance held not consummated, by reason of the failure to either deliver the policy or pay the first premium, as agreed. Hoyt *v.* Mutual Benefit Co., 98 Mass. 539 (1868); Markey *v.* Same, 103 Mass. 78 (1869); 126 Mass. 158 (1879); Heiman *v.* Phœnix Mutual Co., 17 Minn. 153 (1871); St. Louis Mutual Co. *v.* Kennedy, 6 Bush. (Ky.), 450 (1869). So in case of failure to deliver. McCully *v.* Phœnix Mutual Co., 18 W. Va. 782 (1881).

[2] A policy providing that it should not be in force until countersigned by the agent has been held invalid until so countersigned. Continental Co. *v.* Webb, 54 Ala. 688, 698 (1875); Noyes *v.* Phœnix Co., 1 Mo. App. 584 (1876); McCully *v.* Phœnix Mutual Co., 18 W. Va. 782 (1881); Hardie *v.* St. Louis Mutual Co., 26 La. Ann. 242 (1874); Prall *v.* Mutual Protection Soc., 5 Daly, 298; affirmed, it seems, in 63 N. Y. 608 (1875). See Confederation Assoc. *v.* O'Donnell, 10 Canada Supm. Ct. 92 (1882); 13 Id. 218 (1886). So even where the insured himself was the agent who was to countersign. Badger *v.* American Popular Co. 103 Mass. 244 (1869). But see Norton *v.* Phœnix Mutual Co., 36 Conn. 503 (1870).

And notwithstanding that a policy may expressly require countersigning, it has been held that it may be dispensed with where the intention to execute is sufficiently plain. Myers *v.* Keystone Mutual Co., 27 Pa. St. 268 (1856); Kantrener *v.* Penn Mutual Co., 5 Mo. App. 581 (1878).

[3] See note 1, above. If the contract contains no condition making the taking effect of it conditional on the payment of the first premium, delivery of the policy without requiring payment creates a presumption that a credit was intended, and hence the contract takes effect from the time of delivery. Miller *v.* Brooklyn Co., 12 Wall. 285, 303 (1870; so held of a stock company). See Bushaw *v.* Women's Mutual Co., 8 N. Y. Suppl. 423 (1889).

part of the insurer, such as delivery of the policy, that would otherwise have the effect to consummate the contract, fails to have that effect, if prior to such consummation the applicant has died[1] or there has been a material change in his health.[2] Otherwise a fraud would be perpetrated on the insurer.

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[1] Piedmont & Arlington Co. *v.* Ewing, 92 U. S. 377 (1875); Lefavour *v.* Ins. Co., 1 Phila. (Pa.), 558 (1850–5); Kentucky Mutual Co. *v.* Jenks, 5 Ind. 96 (1854; where, however, the contract was held consummated before the death of applicant); Misselhorn *v.* Mutual Reserve Fund Assoc., 30 Mo. App. 589 (1889); Same *v.* Same, 30 Fed. Rep. 545 (1887); Rogers *v.* Charter Oak Co., 41 Conn. 97 (1874).

[2] Rose *v.* Medical Invalid Soc., 11 Scotch Session Cases, 2d series, 345 (1848); Canning *v.* Farquhar, 16 L. R. Q. B. D. 727 (1886); British Equitable Co. *v.* Great Western Co, 38 L. J. Ch. 132 (1868); Whitley *v.* Piedmont & Arlington Co., 71 N. C. 480 (1874); Ormond *v.* Fidelity Assoc., 96 N. C. 158 (1887); De Camp *v.* N. J. Mutual Co., 3 Ins. L. J. 89 (1873). But in Fried *v.* Royal Co., 50 N. Y. 243 (1872), the court refused to allow an otherwise binding contract for insurance to be impaired by standing private instructions from the insurer to its agent not to deliver any policy if a change had taken place in the health of the insured, to whose notice such instructions had not been brought.

CHAPTER III.

NEGOTIATION AND CONSUMMATION OF THE CONTRACT.—VARIOUS CLASSES OF STATEMENTS BY APPLICANT CONCERNING THE SUBJECT OF THE RISK.

A.

STATEMENTS CONCERNING HEALTH.

B.

STATEMENTS CONCERNING BODILY INJURIES.

§ 25. **General scope of this chapter.**—We have now considered the rules applicable *generally* to statements made by the applicant concerning the subject of the risk; we have now to consider such statements with reference to the *particular subjects* concerning which they are made. And first it is to be noted that we here include not merely statements as to what *is* or *has been*, but statements as to what *will* or *will not* be, thus including *conditions*, as, for instance, those imposing restrictions on future residence or occupation.

Clearly the class of statements to first suggest itself is that concerning the *health* of the applicant. And, in immediate connection therewith, are suggested the various classes of statements concerning *acts*, the doing or refraining from which has a tendency to preserve or impair health, as the case may be; or statements indicating a *condition of things* the presence or absence of which has such tendency. And, in close connection with statements

concerning health, come statements concerning *bodily injuries* that the applicant may have received. And statements concerning *past* bodily injuries naturally suggest conditions limiting the risk in case of *future* bodily injuries, as, for instance, in case of *suicide* or injury resulting from *negligence.*

A.

STATEMENTS CONCERNING HEALTH.

§ 26. **Nature of the questions concerning statements as to health.**—Although the truth or untruth of statements concerning bodily health is ultimately one of fact,[1] yet, as preliminary to determining this question of fact, it is commonly necessary to obtain, as a matter of law, the interpretation of such statements. The question of the materiality of such statements can seldom arise, as, even if otherwise immaterial, they usually become material by express agreement.[2] Thus we assume the question to be as to their *truth* or *untruth.*

§ 27. **Statements to effect that applicant is or has been in "good health."**—Broadly speaking, the condition of an applicant is one either of good health or of disease. As one condition negatives the other, a statement that the applicant is in "good health" may be regarded as equivalent to a statement that he is free from disease. But, even regarded as a warranty, such a statement is not falsified by proof of the existence of a mere temporary ailment, unless it be such as to indicate a vice in the constitution, or be so serious as to have some bearing upon the general health, and the continuance of life, or such as according to common understanding would be called a disease.[3] The same

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[1] See Doty *v.* N. Y. State Mutual Assoc., 9 N. Y. Suppl. 42 (1890).

[2] See § 17.

[3] Galbraith *v.* Arlington Mutual Co., 12 Bush (Ky.), 29, 40 (1876);

may be said of such equivalent statements as that the applicant is in "sound health."[1]

§ 28. **Statements to effect that applicant is or has been free from "disease."**—The statement that applicant is free from "disease," being equivalent to a statement that he is in "good health," what has been previously said will

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Goucher *v.* Northwestern Traveling Men's Assoc., 20 Fed. Rep. 596 (1884); Conver *v.* Phœnix Co., 3 Dillon, 224 (1874); Alabama Gold Co. *v.* Johnston, 80 Ala. 467, 475 (1886). In Hutchison *v.* National Loan Co., 7 Scotch Session Cases, 2d series, 467 (1845), a warranty of "good health" was held not falsified by fact that a *post mortem* examination revealed an internal morbid affection that had never manifested itself externally. See, also, Ross *v.* Bradshaw, 1 Wm. Bl. 312 (1761); Holloman *v.* Life Ins. Co., 1 Woods, 674 (1874); Swick *v.* Home Co., 2 Dillon, 160 (1873). So a statement by the applicant, that a third person inquired about is in "good health," simply means that such person has indicated in his action and appearance no symptoms or traces of disease, and to the observation of an ordinary friend or relative is in truth well. Grattan *v.* Metropolitan Co., 92 N. Y. 274, 280 (1883); Ferguson *v.* Mass. Mutual Co., 32 Hun, 306, 314 (1884; where the applicant was a creditor of the person inquired about). Statement that the "general appearance" of insured was healthy, held not disproved by evidence that he was pale and emaciated. Masons' Benev. Soc. *v.* Winthrop, 85 Ill. 537, 542 (1877). Whether the habit of taking opium was a breach of warranty of "perfect health," held for the jury. Forbes *v.* Edinburgh Co., 10 Scotch Session Cases, 1st series, 451, 464 (1832). As to competency of evidence to show general health, see Conn. General Co. *v.* McMurdy, 89 Pa. St. 363 (1879).

[1] Brown *v.* Metropolitan Co., 65 Mich. 306, 314 (1887); Morrison *v.* Wisconsin Odd Fellows' Assoc., 59 Wis. 162, 170 (1884; holding that a "touch of dyspepsia coming on," which manifested itself only after long intervals, which yielded readily to medical treatment, and which was not shown to be organic and excessive, was not inconsistent with such statement). See under Georgia Code, Southern Co. *v.* Wilkinson, 53 Ga. 535, 549 ((1874). See Piedritzky *v.* Supreme Lodge Knights of Honor, 76 Mich. 428 (1889); Maine Benefit Assoc. *v.* Parks, 81 Me. 79 (1888). As to statement that insured is of "sound body," see Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 658 (1885).

apply here.[1] *A fortiori* is this true of such statements

[1] Cushman *v.* U. S. Co., 70 N. Y. 72, 77 (1877), where it was held properly submitted to the jury whether congestion of the liver was under the circumstances a *disease* of the liver. S. P. Goucher *v.* Northwestern Traveling Men's Assoc., 20 Fed. Rep. 596, 599 (1884). The same rule as to the interpretation of the word "disease" was applied in McGrath *v.* Metropolitan Co., 6 N.Y. State Reporter, 376 (1887); Higbie *v.* Guardian Mutual Co., 53 N. Y. 603, 605 (1873); (Manhattan) Co. *v.* Francisco, 17 Wall. 672 (1873); Northwestern Mutual Co. *v.* Heimann, 93 Ind. 24, 29 (1883); Cheever *v.* Union Central Co., 6 Cin. L. Bull. 196 (1881); Metropolitan Co. *v.* McTague, 49 N. J. Law, 587, 591 (1887; mere cold held to be neither "disease" nor "sickness"). See Continental Co. *v.* Yung, 113 Ind. 159, 162 (1887); Swick *v.* Home Co., 2 Dillon, 160 (1873); Horn *v.* Amicable Mutual Co., 64 Barb. 81 (1872). In Boos *v.* World Mutual Co., 6 T. & C. 364, affirmed in 64 N. Y. 236 (1876), the question whether "sunstroke" and "pneumonia" were "serious diseases" was held for the jury. So whether "chronic pharyngitis" was a "sickness," held for the jury. Mutual Benefit Co. *v.* Wise, 34 Md. 582, 598 (1871). Gastritis held not necessarily a "severe sickness or disease." Price *v.* Phœnix Mutual Co., 17 Minn. 497, 518 (1871). Tonsilitis held a disease. McCollum *v.* Mutual Co., 55 Hun, 103, 108 (1890). The term "local disease" held to include tubercular affection of lungs or brain. Scoles *v.* Universal Co., 42 Cal. 523 (1872). As to rheumatism, see Price *v.* Phœnix Mutual Co., 17 Minn. 497, 518 (1871). Statement that applicant was not "subject to fits," held not falsified by proof of one fit. Chattock *v.* Shaw, 1 Moody & R. 498 (1835). See as to "having or being affected with fits," Alabama Gold Co. *v.* Johnston, 80 Ala. 467, 475 (1886). As to "pulmonary disease," see Miller *v.* Confederation Co., 14 Ontario App. 218, 234 (1886). As to sunstroke being a "disease of the brain," see (Knickerbocker) Co. *v.* Trefz, 104 U. S. 197, 207 (1881). As to bronchitis, see Campbell *v.* New England Mutual Co., 98 Mass. 381, 399, 406 (1867); cancer, Cheever *v.* Union Central Co., 6 Cin. L. Bull. 196 (1881); "affection of the liver," Conn. Mutual Co. *v.* Union Trust Co., 112 U. S. 250, 257 (1884); rupture, Ætna Co. *v.* France, 91 U. S. 510 (1875); Bright's disease, Continental Co. *v.* Yung, 113 Ind. 159 (1887); consumption, Vose *v.* Eagle Co., 6 Cush. (Mass.), 42 (1850); vertigo, Mutual Benefit Co. *v.* Daviess, 87 Ky. 541, 547 (1888). For facts constituting fraudulent concealment of fact of spitting blood, see Campbell *v.* New England Mutual Co., 98 Mass. 381, 395 (1867); Smith *v.* Ætna Co., 5 Lans. 545, 550 (1871); Mutual Benefit Co. *v.* Miller, 39 Ind. 475 (1872); Piedritzky *v.* Supreme Lodge Knights of Honor, 76 Mich. 429 (1889); Dreier *v.* Continental Co., 24 Fed. Rep. 670 (1885);

as that he has had no "*serious* illness,"[1] no "severe ill-

Geach *v.* Ingall, 14 Mees. & W. 95 (1845). Medical testimony held properly admitted to show that the "spitting of blood" is a medical term, and means spitting of blood from the lungs; that spitting of blood from the mouth, throat, stomach or nose is not called by that name by doctors or in medical books. Singleton *v.* St. Louis Mutual Co., 66 Mo. 61, 76 (1877). The term "bodily infirmities or disease" does not include insanity. (Accident) Co. *v.* Crandal, 120 U. S. 527, 532 (1887). And "bodily infirmity" held not to include nearsightedness. Cotten *v.* Fidelity & Casualty Co., 41 Fed. Rep. 507, 510 (1890). An inquiry as to the existence of consumption, scrofula, insanity, epilepsy, diseases of the heart, or *other hereditary disease*, held properly answered in the negative notwithstanding the existence of insanity not of a hereditary character. The last three words of the question limited the generality of the preceding. Peasley *v.* Safety Deposit Co., 15 Hun, 227 (1879). Evidence that the father of the insured had suffered from a brain disease, accompanied by some weakening of the mental powers, and had been declared insane by a probate judge on an *ex parte* examination, and been committed to a private asylum, held, under all the circumstances, insufficient to show falsity of statement that none of the family of insured had been afflicted "with insanity . . . or other hereditary disease." Newton *v.* Mutual Benefit Co., 76 N. Y. 426, 429 (1879). For discussion of evidence as to alleged misrepresentations as to existence of diseases, see Swift *v.* Mass. Mutual Co., 2 T. & C. (N. Y.), 302 (1873; scrofula, disease of blood); reversed on another point in 59 N. Y. 186 (1875); Britton *v.* Mutual Benefit Co., 3 T. & C. (N. Y.), 220 (1874; disease of kidneys); Mulliner *v.* Mutual Co., 1 T. & C. (N. Y.), 448, 451 (1873; headache); Wright *v.* Equitable Soc., 50 How. Pr. 367 (1875); Smith *v.* Ætna Co., 49 N. Y. 211 (1872); Hogle *v.* Guardian Mutual Co., 4 Abb. Pr. N. S. 346 (1868); National Co. *v.* Minch, 53 N. Y. 144 (1873); 5 T. & C. 545 (1874); Doty *v.* N. Y. State Mutual Assoc., 9 N. Y. Suppl. 42 (1890); N. Y. Co. *v.* Flack, 3 Md. 341, 356 (1852); Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 660 (1885); Goucher *v.* Northwestern Traveling Men's Assoc., 20 Fed. Rep. 596, 599 (1884); Hartford Co. *v.* Gray, 91 Ill. 159 (1878); Supreme Council Royal Arcanum *v.* Lund, 25 Ill. App. 492 (1887); Morgan *v.* Bloomington Mutual Assoc., 32 Ill. App. 79 (1889); Co-operative Assoc. *v.* Leflore, 53 Miss. 1, 14 (1876); Glutting *v.* Metropolitan Co., 50 N. J. Law, 287 (1888); Flynn *v.* Mass. Benefit Assoc., 25 Northeastern Rep. 716 (Supm. Ct. Mass., 1890); Miller *v.* Confederation Co., 14 Ontario App. 218, 226, 233 (1886).

[1] Masons' Benev. Soc. *v.* Winthrop, 85 Ill. 537, 542 (1877); Galbraith

ness,"[1] has been "never sick."[2] Nor does it seem that a less liberal rule is applied where the statement is that he is free from a *particular* disease.[3]

§ 29. **Competency of evidence of condition of health of insured prior or subsequent to contract.**—It is obvious that to some extent evidence of the condition of the health of the insured, at a time *prior or subsequent to* the time the contract was made, is competent evidence to show what was

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v. Arlington Mutual Co., 12 Bush (Ky.), 29, 38 (1876), where the same rule was applied to statement that insured had never had any "serious illness, local disease, affection or personal injury," that he was subject to no "conditions, fits or diseases, or addicted to any practice tending to impair the constitution or shorten life," that his "habits of life had always been correct and temperate," that he was at the time "in good health and free from any symptom of disease."

[1] Goucher *v.* Northwestern Traveling Men's Assoc., 20 Fed. Rep. 596, 601 (1884). So of "severe sickness or disease." Holloman *v.* Life Ins. Co., 1 Woods, 674 (1874); Conver *v.* Phœnix Co., 3 Dillon, 224 (1874).

[2] The expression never "sick" held, taken in its connection, to mean, not that the party was never sick at all of any disorder, but only that he never had any of the enumerated diseases so as to constitute an attack of sickness. (Knickerbocker) Co. *v.* Trefz, 104 U. S. 197, 204 (1881).

[3] It was, indeed, laid down in an elaborately considered case, that where there was a warranty that the applicant never had had any of certain diseases *specified* (as gout, rheumatism), the contract was avoided if he had had any affection amounting to a disease of the kind specified, no matter how trifling the character of the affection, and whether or not it was remembered at the time of the application, and whether or not it would have any influence on the length of his life, and whether or not it would be noticed by the medical examiner. Price *v.* Phœnix Mutual Co., 17 Minn. 497, 516 (1871). But the current of authority is clearly to the contrary, especially as indicated by the most recent cases. See Cushman *v.* U. S. Co. above, and other cases cited. Thus, a statement that insured had never had the gout, held not falsified merely by proof of symptoms that an experienced medical man might see indicated the presence of gout in the system. Fowkes *v.* Manchester & London Co., 1 Foster & F. 440 (1862).

such condition at the time of the contract.[1] But it is impracticable to lay down a very definite rule as to the limits of the competency of such evidence, save that the tendency of the decisions is to make those limits somewhat narrow, at least where the evidence is offered for the purpose of *causing* a forfeiture of the contract.[2]

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[1] Kelsey *v.* Universal Co., 35 Conn. 225, 235 (1868; declarations and letters of insured made and written *shortly before* the time the contract was made, held properly admitted). So of declarations made shortly after. Aveson *v.* Kinnaird, 6 East, 188 (1805). See, however, Washington Co. *v.* Haney, 10 Kans. 525, 535 (1873); Union Central Co. *v.* Cheever, 2 Cin. L. Bull. 19 (1877); Union Mutual Co. *v.* Reif, 2 Cin. L. Bull. 290 (1876). So his statements made before the application as to his condition *at the time,* held properly admitted, whether made to medical men or not, and though not made in answer to inquiries as to his health, or observations of others as to his appearance. Singleton *v.* St. Louis Mutual Co., 66 Mo. 63, 76 (1877). But such statements as to his condition at *any previous time,* held properly excluded. Id. The applicant having died of nervous apoplexy within three years after his application, in which he warranted that he was in good health, and had not for seven years had any severe disease, held error to reject medical testimony to show the nature of nervous apoplexy, and that death by it is the result of some disease of long standing. Edington *v.* Ætna Co., 77 N. Y. 564, 567 (1879). Photograph recognized and proved by witnesses to be a correct and truthful representation of insured at or about the time of the contract, held properly admitted as evidence of her physical appearance and condition. Schaible *v.* Washington Co., 9 Phila. (Pa.), 136 (1873).

[2] The opinion of a medical witness that a person was not fit for insurance in June, held not competent evidence in an action on a policy issued the following Aug. 30th, there being no issue in the pleadings as to his health prior to the date of the policy. (American) Co. *v.* Mahone, 21 Wall. 152 (1874). Statement that insured was not at the time of the application subject to dyspepsia, held not disproved by evidence of his having suffered from dyspepsia sometime from six months to half a year before such application. World Mutual Co. *v.* Schultz, 73 Ill. 586 (1874). Statement and evidence that insured was in good health at the time of the application, held not disproved by the mere fact of his being shortly after stricken with a disease that caused his death. Eclectic Co. *v.* Fahrenburg, 68 Ill. 436 (1873). Compare Watson *v.* Mainwaring, 4

Undoubtedly, however, a wider range would be given to evidence offered for the purpose of *preventing* a forfeiture.[1] It would seem that, ordinarily, at least, a statement made by the insured on a *renewal* of the contract, that he is at the time in "good health," is to be construed by the standard of health existing at the time of the original contract.[2]

§ 30. **Competency of witnesses to testify as to health.**— The general rule of evidence by which opinion evidence is excluded, is applied to testimony as to health.[3] So, too, the rule allowing expert testimony, and of course this testimony is commonly the testimony of medical men.[4] In

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Taunt. 763 (1813). See also as to evidence of health, Metropolitan Co. *v.* Dempsey, 19 Atlantic Rep. 642 (Ct. of App. of Md., 1890).

[1] A creditor who had effected insurance on the life of his debtor allowed to prove the debtor's good health prior to the application, so as to show there was no breach of warranty. Rawls *v.* American Mutual Co., 27 N. Y. 282, 290 (1863); Ferguson *v.* Mass. Mutual Co., 32 Hun, 306, 314 (1884).

[2] Peacock *v.* N. Y. Co., 20 N. Y. 293 (1859; holding that recovery on the contract could be allowed if the same sanitary condition of the insured, as represented in his original declaration, continued up to and existed at the time of the renewal). But in Metropolitan Co. *v.* McTague, 49 N. J. Law, 587 (1887) the terms of the contract of renewal were held such as to show that the statements as to health were to be construed by the standard existing at the time of renewal. Compare (Mutual Benefit) Co. *v.* Higginbotham, 95 U. S. 380, 386 (1877).

[3] The question whether a person was "in good health and free from symptoms of disease," held properly excluded as involving a mere conclusion. Reid *v.* Piedmont & Arlington Co., 58 Mo. 421, 425 (1874). So a statement that when insured matured in life his diseased condition developed. Southern Co. *v.* Wilkinson, 53 Ga. 535, 546 (1874). So held not error to refuse to allow an inexpert witness to testify that insured had the asthma, but held error to refuse to allow him to testify that he had "shortness of breath." United Brethren Mutual Aid Soc. *v.* O'Hara, 120 Pa. St. 256 (1888).

[4] See Ætna Co. *v.* France, 91 U.S. 510 (1875). The declarations of decedent made to his physician as to the cause of his illness and death, held properly admitted. Dabbert *v.* Travelers' Co., 2 Cin.

some jurisdictions, however, medical testimony offered to show the falsity of statements respecting health, is sometimes governed by the statutory inhibition against the disclosure of information acquired while attending a patient in a professional character.[1]

§ 31. **Statements as to medical attendance.**—Of course the fact that the applicant has or has not required the services of a physician or other medical attendant,[2] has an im-

(Ohio), 98 (1870). See also as to medical testimony on this point, Wilkinson *v.* Conn. Mutual Co., 30 Iowa, 119, 128 (1870). Expert evidence as to what description of persons companies engaged in the business of life insurance would consider a good risk, held properly excluded. Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 652 (1885). So held proper to refuse to allow physicians to testify what, in their opinion, in certain cases, and under a certain state of facts, would be a good or bad risk for a life insurance company to take, or what circumstances should be considered on the question of increasing or lessening the rates of insurance. Rawls *v.* American Mutual Co., 27 N. Y. 282, 293 (1863). In Higbie *v.* Guardian Mutual Co., 53 N. Y. 603 (1873), held proper to refuse to allow the medical examiner to state whether, if he had been advised of certain facts, it would have called upon him to make further inquiries, and as to the effect such knowledge would have had upon his answer to the question as to the propriety of taking the risk. See also § 36. But see Valton *v.* National Loan Fund Assoc., 5 Abb. App. 437 (1864), § 34, note.

[1] See, for example, Edington *v.* Mutual Co., 67 N. Y. 185, 194 (1876); Edington *v.* Ætna Co., 77 N. Y. 564, 569 (1879); Grattan *v.* Metropolitan Co., 80 N. Y. 281, 294 (1880); 92 N. Y. 274, 287 (1883); Ferguson *v.* Mass. Mutual Co., 32 Hun, 306, 315 (1884); Conn. Co. *v.* Union Trust Co., 112 U. S. 250 (1884); Masonic Mutual Benefit Assoc. *v.* Beck, 77 Ind. 203 (1881); Excelsior Assoc. *v.* Riddle, 91 Ind. 84 (1883); Penn Mutual Co. *v.* Wiler, 100 Ind. 92 (1884); Ætna Co. *v.* Deming, 123 Ind. 384, 390 (1890); Brown *v.* Metropolitan Co., 65 Mich. 306, 316 (1887); Breisenmeister *v.* Supreme Lodge K. of P., 45 Northwestern Rep. 977 (Supm. Ct. Mich. 1890); Linz *v.* Mass. Mutual Co., 8 Mo. App. 363 (1880); Gartside *v.* Conn. Mutual Co., 76 Mo. 446 (1882; with note showing in what States and Territories such statutes exist); Dreier *v.* Continental Co., 24 Fed. Rep. 670 (1885); Adreveno *v.* Mutual Reserve Fund Assoc., 34 Fed. Rep. 870 (1888).

[2] An "attending physician" is not necessarily the "usual medical attendant" of a person. Cushman *v.* U. S. Co., 70 N. Y. 72, 79 (1877).

portant bearing on the question of his health. As the circumstances constituting medical attendance are so infinitely varied, and as the meaning of the term "medical attendant" is comparatively plain to the average comprehension, it would seem better in each instance to leave the question of the truth of the statement that the applicant has had no medical attendant, to be determined as one of fact.[1] But there have been frequent attempts to place a judicial construction on the term "medical attendant," and, so far as such attempts have been successful, they may be said to result in the rule that a mere casual, occasional employment of a physician's services is insufficient to constitute a "medical attendance."[2]

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[1] A charge to that effect was sustained in O'Hara *v.* United Brethren Soc., 134 Pa. St. 417 (1890). And this view is sustained by Scoles *v.* Universal Co., 42 Cal. 523 (1872); Huckman *v.* Fernie, 3 Mees. & W. 505 (1838); Miller *v.* Confederation Co., 14 Ontario App. 218, 229 (1886); Phillips *v.* N. Y. Co., 9 N. Y. Suppl. 836 (1890). The materiality of the fact of medical attendance held, under the circumstances, for the jury to determine. Morrison *v.* Muspratt, 4 Bingham, 60 (1827). In Reid *v.* Piedmont & Arlington Co., 58 Mo. 421 (1874), it is said of the definition given in Price *v.* Phœnix Mutual Co. (see note 2 below), "Where there is no doubt about the fact of the physician's employment, or that he usually attended the family, the rule laid down may be quite sufficient; but when it is uncertain whether there was any physician or not, then it becomes a question of fact, and should be submitted to the jury for their finding." It was there held proper to refuse to allow a witness to answer as an expert what was the meaning of the phrase "family physician," such phrase having no technical meaning.

[2] In the following cases the facts were declared sufficient to show a "medical attendance." Cushman *v.* U. S. Co., 70 N. Y. 72, 78 (1877; attendance at physician's own office); Edington *v.* Mutual Co., 67 N.Y. 185, 198 (1876; casual prescriptions made on street); Union Mutual Co. *v.* Reif, 1 Cin. L. Bull. 290 (1876; application to druggist for prescription and advice); Monk *v.* Union Mutual Co., 6 Robt. (N. Y.), 455 (1866; attendance by a particular physician, and by him alone, on the few occasions on which applicant was indisposed, during a period of three years immediately prior to the application). But in Brown *v.* Metropolitan Co., 65 Mich. 306, 312 (1887), a mere calling into a physician's office for some medicine to relieve a temporary indisposition

§ 32. **Statements as to other insurance.**—The truth of such statements seems nearly always one of fact.[1]

not serious in its nature, was held not an "attendance;" so of a call by the physician at the home of insured for the same purpose. To constitute one a "family physician," held not necessary that he should *invariably* attend and be consulted by the members of a family, in the capacity of a physician, nor that he should attend and be consulted as such physician by each and all the members of the family. Price *v.* Phœnix Mutual Co.. 17 Minn. 497, 519 (1871). In Metropolitan Co. *v.* McTague, 49 N. J. Law, 587, 591 (1887), a statement that applicant had not "consulted or been prescribed for by a physician" held falsified by proof of such a prescription, though it was for a cold, and the nature of the prescription did not appear. So statement that applicant had not "personally consulted a physician, been prescribed for or professionally treated," held falsified by proof of prescription or treatment for pain that did not amount to a disease. Cobb *v.* Covenant Mutual Benefit Assoc., 26 Northeastern Rep. 230 (Supm. Ct. Mass. 1891). As to effect of expression "family physician of the party, or one whom the party has usually employed or consulted," see Price *v.* Phœnix Mutual Co., 17 Minn. 497, 519, 521 (1871). The question, "Has the party employed or consulted a physician?" held truly answered in the negative, notwithstanding proof that he had employed a physician six months or a year and a half before, the form of the question indicating a reference to a time recent. World Mutual Co. *v.* Schultz, 73 Ill. 586 (1874). Where the applicant, being asked to name the physician usually employed by him, or, if he had none, then to name any other doctor who could be applied to for information on the state of his health, answered "none," held, a fraudulent concealment, it appearing that he had been occasionally treated for serious illness by one physician, and examined by the medical adviser of another company, and rejected. Horn *v.* Amicable Mutual Co., 64 Barb. 81 (1872). And the fact that applicant has truly answered that he has no usual medical attendant, does not justify him in answering that he has consulted "no other medical man than such as named above," if he has consulted any. Dentz *v.* O'Neill, 25 Hun, 442 (1881). See also, as to truth or falsity of statements concerning physician employed by applicant, Higgins *v.* Phœnix Mutual Co., 74 N. Y. 6, 9 (1878); Mowry *v.* World Mutual Co., 7 Daly, 321 (1877); McCollum *v.* N. Y. Mutual Co., 55 Hun, 103 (1889); Snyder *v.* Mutual Co., 3 Ins. L. J. 579 (1874); Hutton *v.* Waterloo Co., 1 Foster & F. 735 (1859); Everett *v.* Desborough, 5 Bingham, 503 (1829).

[1] "Other insurance" held to include insurance in aid and accident associations. McCollum *v.* N. Y. Mutual Co., 55 Hun, 103 (1889).

§ 33. **Statements as to age.**—Statements as to age being always, or nearly always, made in response to a direct inquiry, may be regarded as material.[1] The question of the truth of such statements is obviously one of fact,[2] and there is but little scope here for judicial construction.

But held otherwise as to insurance in benefit society. Penniston *v.* Union Central Co., 4 Cin. L. Bull. 935 (1879). A statement that any prior applications for insurance had been successful, held untrue, it appearing that such an application had been received by the agent and forwarded to the company, though there was no medical examination, the medical examiner having pronounced the applicant unfit without an examination. The medical examination is no part of the application. Edington *v.* Ætna Co., 77 N. Y. 564, 572 (1879); 100 N. Y. 536 (1885). In response to a question whether applicant was insured in any other company, and if so, what was the name of each company and the amount in each; giving the name of one company and the amount therein, held not a warranty that he was not insured in any other company. Rehwald *v.* Mutual Co., 14 N. Y. Weekly Digest, 531. Negative answer to question, "Has any application ever been made, either to this or any other company, upon which policy *was not* issued?" held not falsified by proof of application that had not been finally passed upon by the company. Langdon *v.* Union Mutual Co., 14 Fed. Rep. 272 (1882). See also as to truth of statements concerning applications for other insurance, Continental Co. *v.* Chamberlain, 132 U. S. 304 (1889); N. Y. Co. *v.* Flack, 3 Md. 341, 354 (1852); Mutual Benefit Co. *v.* Wise, 34 Md. 582, 598 (1871); Clapp *v.* Mass. Benefit Assoc., 146 Mass. 519, 531 (1888); American Co. *v.* Mahone, 56 Miss. 180 (1878); Fowkes *v.* Manchester & London Co., 3 Foster & F. 440 (1862); London Assurance *v.* Mansel, 11 L. R. Ch. D. 363 (1879); Matter of General Provincial Co., 18 Weekly Reporter, 396 (1870).

[1] Swett *v.* Relief Society, 78 Me. 541 (1886; contract held void for statement of age as 59, instead of 64, as in reality). So in Ætna Co. *v.* France, 91 U. S. 510 (1875), of statement of age as 30, instead of 35, as in reality. So in Low *v.* Union Central Co., 6 Cin. L. Bull. 666 (1881). See also, as to statements concerning age, Southern Co. *v.* Wilkinson, 53 Ga. 535, 548 (1874); Alabama Gold Co. *v.* Mobile Mutual Co., 81 Ala. 329 (1886); Linz *v.* Mass. Mutual Co., 8 Mo. App. 363 (1880).

[2] Murphy *v.* Harris, Batty (Irish), 206 (1826). Opinion of witness

§ 34. **Statements as to pecuniary circumstances.**—The pecuniary circumstances of the applicant, though having little apparent relevancy to the subject of the risk, are, of course, subjects of legitimate inquiry.[1]

§ 35. **Statements as to family relationship.**—Like his pecuniary circumstances, the family relationship of the applicant is a subject of legitimate inquiry.[2]

§ 36. **Statements as to use of intoxicating liquors.**—The truth of statements by the insured as to his use of intoxicating liquors is, generally speaking, one of fact.[3] But the

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as to age of insured, based on inference from his appearance, held properly excluded. Valley Mutual Assoc. *v.* Teewalt, 79 Va. 421 (1884). Statements made by insured, as to his age, several years before the date of the contract, held improperly admitted, as being hearsay. Westropp *v.* Bruce, Batty (Irish), 155 (1826). So entry in minute-book of lodge of Odd Fellows, of which insured was a member, made prior to the making of the contract, and showing his age as recorded by the secretary of the lodge in the usual manner of keeping its records, held properly excluded as being hearsay. Conn. Mutual Co. *v.* Schwenk, 94 U. S. 593 (1876).

[1] Valton *v.* National Loan Fund Soc., 4 Abb. App. 437 (1864; holding it error to refuse to allow the medical examiner of the insurer to testify to the effect produced on his mind by the representation of the applicant that he was a moneyed man).

[2] Untrue response that applicant was "widower," in answer to question whether he was married, held material misrepresentation. Mutual Aid Soc. *v.* White, 100 Pa. St. 12 (1882). See Jeffries *v.* Union Mutual Co., 1 Fed. Rep. 450 (1880). But false statement that beneficiary was cousin of applicant, held immaterial. Britton *v.* Royal Arcanum, 46 N. J. Eq. 102, 106 (1889).

[3] Thus whether his habits of life are temperate. McGinley *v.* U. S. Co., 8 Daly, 390; affirmed in 77 N. Y. 605 (1879). So whether he is habitually temperate. Northwestern Co. *v.* Muskegon Bank, 122 U. S. 501, 506 (1887); Meacham *v.* N. Y. State Mutual Assoc., 120 N. Y. 237 (1890). In Life Assoc. of Scotland *v.* McBlain, 9 Irish Rep. (Equity), 176 (1875), a suit to enjoin an action on a policy, on the ground of an untrue statement by applicant that he had always been of sober

expressions used in this connection have to some extent received judicial construction. Thus a statement by the insured that his habits are *temperate* is declared not to imply *total abstinence*,[1] and so a statement that he never

and temperate habits, was held not maintainable, on the ground that the question was properly cognizable by a court of law, with the aid of a jury.

Held proper for a non-expert witness to state whether a person had the appearance of being intoxicated. Cook *v.* Standard Co., 47 Northwestern Rep. 568 (Supm. Ct. Mich. 1890). Where (so far as appears) no statements by the insured were in question, an offer by the insurer to prove by insurance experts that a person in the habitual use to excess of intoxicating drinks, would not be considered an insurable subject, was held properly excluded. Rawls *v.* American Mutual Co., 27 N. Y. 282, 290 (1863).

[1] Thus of statement that he is "sober and temperate." Brockway *v.* Mutual Benefit Co., 9 Fed. Rep. 249 (1881). Or that he is "correct and temperate in his habits." Meacham *v.* N. Y. State Mutual Co., above. So representation that he was and always had been "of temperate habits," held true, notwithstanding that he might have had an attack of *delirium tremens* from an exceptional over-indulgence. (Knickerbocker) Co. *v.* Foley, 105 U. S. 350 (1881). See Mowry *v.* Home Co., 9 R. I. 346, 354 (1869); Swick *v.* Home Co., 2 Dillon, 160 (1873). But on the other hand, where the question was as to the truth of a statement that he had never "been intemperate," and that he was at the time of the application "of correct and temperate habits," held error to charge that a *daily* use of intoxicating liquor was necessary to constitute an intemperate habit. Union Mutual Co. *v.* Reif, 36 Ohio St. 597 (1881). So, to falsify statement he was of "sober and temperate habits," held not necessary to show that he was so intemperate as to injure his health or shorten his life. Southcombe *v.* Merriman, Carrington & M. 286 (1842). As to effect of term, "so far intemperate as to impair health," see Ætna Co. *v.* Davey, 123 U. S. 739 (1887); Davey *v.* Ætna Co., 38 Fed. Rep. 650 (1889); Odd Fellows Co. *v.* Rohkopp, 94 Pa. St. 59 (1880); Ætna Co. *v.* Deming, 123 Ind. 384 (1890). See generally as to evidence as to intemperate habits, United Brethren Mutual Aid Soc. *v.* O'Hara, 120 Pa. St. 256 (1888); Mutual Benefit Co. *v.* Godfrey, 2 Cin. (Ohio), 379 (1872); Hartwell *v.* Alabama Gold Co., 33 La. Ann. 1353 (1881); Thomson *v.* Weems, 9 L. R. App. Cas. 671 (1884). As to meaning of term "bad or vicious habit," used with reference to intemperance, see Holterhoff *v.* Mutual Benefit Co., 3 Am. L. Rec. (Cin. Ohio),

uses intoxicating liquors is not falsified by proof of a *single* or *incidental* use, the expression having reference to a *customary* or *habitual* use.[1] With reference to evidence tending to show the truth or falsity of statements of this kind, it is obvious that, to a certain extent, evidence of the habits of the insured at a time *prior* or *subsequent* to the time respecting which the statement is made, is admissible, but it seems impracticable to lay down a more definite rule on this point, though, on the whole, it would seem to be the tendency of the decisions to make the range of such evidence somewhat narrow.[2] We have thus far been speaking of statements relating to the present or past, but sometimes the provisions of the contract on this point relate to the future, as in case of an exception from the risk, of death resulting from the use of intoxicating liquors.[3]

272, 291 (1874). As to "delirium tremens," see Ætna Co. *v*. Deming, 123 Ind. 384, 388 (1890). As to competency to testify as to intemperate habits, see (Knickerbocker) Co. *v*. Foley, 105 U. S. 350 (1881); Northwestern Co. *v*. Muskegon Bank, 122 U. S. 501 (1887); Brockway *v*. Mutual Benefit Co., 9 Fed. Rep. 249 (1881); Weems *v*. Thomson, 11 Scotch Session Cases, 3d series, 658 (1884).

[1] Van Valkenburgh *v*. American Popular Co., 70 N. Y. 605 (1877). See Moore *v*. Conn. Mutual Co., 6 Canada Supm. Ct. 695, 697 (1879).

[2] Statement that insured was at time of application sober, temperate and of good health, held not to prevent recovery, merely by evidence of intemperance subsequent to application. Reichard *v*. Manhattan Co., 31 Mo. 518 (1862). As to how far evidence of such subsequent intemperance is admissible, see American Co. *v*. Day, 39 N. J. Law, 89, 95 (1876). As to evidence of intemperate habits prior to application, see John Hancock Mutual Co. *v*. Daly, 65 Ind. 6 (1878).

[3] Exception of "death caused by the use of intoxicating drink or opium," held to cover only death *directly* so caused. Mutual Co. *v*. Stibbe, 46 Md. 302, 314 (1876); and not to cover the fatal administration of alcohol or opium by a physician with the intent of curing sickness, though such sickness was occasioned by their excessive voluntary use. N. Y. Co. *v*. Boiteaux, 4 Am. L. Rec. (Cin. Ohio), 1 (1875). So exception of death "by reason of intemperance from the use of intoxicating liquors," held to cover only death *directly* so caused. Holterhoff *v*. Mutual Benefit Co., 3 Am. L. Rec. (Cin. Ohio), 272, 292 (1874). As

Or in case of the common exception of an injury "happening while the insured is under the influence of intoxicating liquor," where the question clearly is, whether the state of intoxication existed at the time of the injury, irrespective of the question whether such intoxication was a *cause* of the injury.[1]

§ 37. Statements as to use of narcotics, or tobacco.[2]

§ 38. Statements as to occupation.—Statements respecting occupation are so varied in character as to furnish but

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to how far intemperance may be regarded as a cause of death, see Miller *v.* Mutual Benefit Co., 31 Iowa, 216, 236 (1871). In a later decision in the same case, in 34 Iowa, 222 (1872), the defense that insured died "by reason of intemperance from the use of intoxicating liquors," was held sustained by evidence that he escaped from those having him in charge, while he was in a fit of *delirium tremens*, ran into the open air and through the streets in inclement weather without clothing, and that such exposure contributed to his death. See further decision in 39 Iowa, 304 (1874). Compare Travelers' Co. *v.* Harvey, 82 Va. 949, 961 (1881).

A by-law of a benefit society withholding benefits in case of intemperance, etc., sustained as reasonable. St. Mary's Soc. *v.* Burford, 70 Pa. St. 321 (1872). A contract of insurance in a temperance benefit society held void for violation of the pledge of total abstinence, without trial and conviction therefor for such violation. Supreme Council Royal Templars *v.* Curd, 111 Ill. 284 (1884); Smith *v.* Knights of Father Matthew, 36 Mo. App. 184 (1889); Hogins *v.* Supreme Council Champions of Red Cross, 76 Cal. 109 (1888).

[1] Macrobbie *v.* Accident Co., 23 Scottish L. Rep. 391 (1886). So where the exception was of an injury happening "while the insured *was or in consequence of his having been* under" such influence. Shader *v.* Railway Passenger Co., 66 N. Y. 441 (1876). And so where, at the time of the injury insured against, he was under such influence, though not at the time of the death resulting from such injury. Mair *v.* Railway Passenger Co., 37 L. T. R. 356 (1877). As to evidence of death while intoxicated or from the effects of drunkenness, see Newman *v.* Covenant Mutual Assoc., 76 Iowa, 56, 64 (1888).

[2] See Continental Co. *v.* Thœna, 26 Ill. App. 495 (1888).

little scope for the laying down of general rules of interpretation, especially as the question of their truth is nearly always one of fact.[1] It may be said, however, that, in the absence of expression to the contrary, a statement of the occupation of the insured, as of a particular kind, implies that he is, at the time of making the statement, engaged therein.[2] Such statement is not, however, falsified by proof of a merely temporary suspension of the occupation,[3] though it would ordinarily be falsified by proof of a suspension extending through several years, or resulting from old age or other continuous disability.[4] And as such a statement refers to the *present*, it does not, ordinarily at least, refer to the *future*, so as to constitute a condition restricting the action of the insured. Thus, for instance, in case of accident insurance, it does not imply that the insurance is confined to accidents happen-

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[1] Kenyon *v.* Knights Templar Assoc., 122 N. Y. 247, 258 (1890). As to correctness of statement that applicant was a "real estate and grain dealer," see Dwight *v.* Germania Co., 103 N. Y. 341, 349 (1886). That he was "farmer," where there was evidence to show that he was a slave taker. Hartman *v.* Keystone Co., 21 Pa. St. 466, 477 (1853). That he was "livery stable proprietor." Brink *v.* Guaranty Mutual Assoc., 7 N. Y. Suppl. 847 (1889). That he was "soda water maker," where it appeared that he was also engaged in selling it. Grattan *v.* Metropolitan Co., 80 N. Y. 281, 291 (1880); 92 N. Y. 274, 288 (1883). As to correctness of answer to question whether applicant was at the time, or had been engaged in or connected with the manufacture or sale of any beer, wine or other intoxicating liquors, see Dwight *v.* Germania Co., 103 N. Y. 341, 349 (1886), where such question was held to include within its scope and meaning single transactions and incidental occupations. Compare McGurk *v.* Metropolitan Co., 56 Conn. 528 (1888); Kenyon *v.* Knights Templar Assoc., above.

[2] Mutual Aid Soc. *v.* White, 100 Pa. St. 12 (1882).

[3] Mutual Aid Soc. *v.* White, above; Mowry *v.* World Mutual Co., 1 Daly, 321 (1877; where the insured, described as a manufacturer, was at the time temporarily engaged in keeping a billiard saloon).

[4] Mutual Aid Soc. *v.* White, above.

ing in the pursuit of such occupation, or that the insured agrees to engage in no other occupation.[1]

§ 39. **Statements as to residence and travel.**—What has been said respecting the impracticability of laying down rules of interpretation of statements respecting occupation will apply here. The question of the truth of such statements is ordinarily one of fact.[2] And where they relate to

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[1] Provident Co. *v.* Fennell, 49 Ill. 180 (1868); Provident Co. *v.* Martin, 32 Md. 310 (1869). Of course such statements may be made to have the effect of conditions. See as to such statements, § 52. As to "change of occupation," see North American Co. *v.* Burroughs, 69 Pa. St. 43, 53 (1871); Stone *v.* U. S. Casualty Co., 34 N. J. Law, 371 (1871), where one described as "teacher" was held not to have changed his occupation, so as to prevent recovery on the contract, though his death resulted from falling from a building that he had in the course of erection, and that he was visiting as a spectator.

A condition against entering into military or naval service, held not violated by engaging in the construction of a railroad bridge under the direction of military authorities. Welts *v.* Conn. Mutual Co., 48 N. Y. 34 (1871), which see as to effect of provision exempting from liability for death resulting from the casualties or consequences of war or rebellion, or from belligerent forces. The questions whether being a chaplain in the army was being "in the military service," and whether being "in the military service" was "being *employed* in such service," held for the jury. Mutual Benefit Co. *v.* Wise, 34 Md. 582, 599 (1871). As to effect of condition against "enlisting," see Franklin Assoc. *v.* Commonwealth, 10 Pa. St. 357 (1849).

[2] A permit to travel granted pending an application for insurance, held to affect only the contract existing at the time it was given, and not to be incorporated into the policy when issued. Rainsford *v.* Royal Co., 33 N. Y. Super. Ct. 453 (1871). The words "settled limits of the United States," as bounds beyond which insured was not to pass, held to mean the established boundaries of the Union, including the Territories, organized and unorganized, and not to be limited to the inhabited portions of the country or the region of settlements. Casler *v.* Conn. Mutual Co., 22 N. Y. 427 (1860). Under a permit to travel "on first class decked vessels," held allowable to travel as steerage passenger on such vessel. Taylor *v.* Ætna Co., 13 Gray (Mass.), 434 (1859). For construction of term "epidemics," as used in permit to travel, see

the future conduct of the insured, and have the effect of conditions, there seems to be no reason for relaxing the general rules as to the violation of conditions on which recovery on a contract is made to depend,[1] though a tendency to

Pohalski *v.* Mutual Co., 36 N. Y. Super. Ct. 234 (1873). As to what constitutes "residence," see Grogan *v.* London & Manchester Industrial Co., 53 L. T. R. 761 (1886). Permission "to reside for one year" at Belize, held not limited to any particular year. Notman *v.* Anchor Co., 4 C. B. N. S. 464 (1858). A printed permission to visit certain places, not including South America, held not to preclude the right to reside in Valparaiso, where the policy described insured as residing there, and an indorsement on the policy gave him the right to reside there on the payment of a sum not named, leaving a blank for the amount; and held the right to reside there existed without further permission or payment. Forbes *v.* American Mutual Co., 15 Gray (Mass.), 249 (1860).

As to effect of concealment of fact of applicant being in prison at the time of the application, see Huguenin *v.* Rayley, 6 Taunt. 186 (1815).

[1] Contract held forfeited for violation of condition restricting travel. Nightingale *v.* State Mutual Co., 5 R. I. 38 (1857). Thus, for failure to travel by the route prescribed in the consent, though the route traveled was the shortest and safest. Hathaway *v.* Trenton Mutual Co., 11 Cush. (Mass.), 448 (1853). So, where such violation happened in the course of efforts to escape from the hands of the law, and held no ground for relief, that the contract provided that the insurer would grant permits for such travel "on reasonable terms," no such permit having been applied for. Douglas *v.* Knickerbocker Co., 83 N. Y. 492, 502 (1881). But conditions as to limits of residence have been held waived by receipt of premiums by agent of insurer. Schmidt *v.* Charter Oak Co., 2 Mo. App. 339 (1876); Walsh *v.* Ætna Co., 30 Iowa, 133 (1870); Bevin *v.* Conn. Mutual Co., 23 Conn. 244 (1854); Wing *v.* Harvey, 5 DeGex, M. & G. 265 (1854). Otherwise of such receipt without actual knowledge by agent that condition has been violated. Lorie *v.* Conn. Mutual Co., 4 Ins. L. J. 632 (1875). And see (Globe Mutual) Co. *v.* Wolff, 95 U. S. 326 (1877). Though where the insurer demanded an increased premium, on the ground that the residence of insured was in violation of the conditions of the contract, and agreed to keep the contract alive until the next day, but then, and when the subsequent annual premiums were offered at the increased rate, refused to receive them, held that the transaction did not amount to a perpetual waiver of the condition, or bind the insurer to renew the

such relaxation is, perhaps, to be found in some of the decisions.[1]

B.

STATEMENTS CONCERNING BODILY INJURIES.

§ 40. **Statements to effect that applicant has received no personal injuries.**—In respect to such statements, a like liberal rule prevails, as in respect to statements concerning health. The expression "hurt," "wound," or the like, is interpreted as meaning an injury to the body causing an impairment of health or strength, or rendering the person more liable to contract disease, or less able to resist its effects.[2] So what is a "serious personal injury" is determinable not exclusively by the impressions of the matter at the time. Its more or less prominent influence on the health, strength and longevity, are to be taken into account.[3]

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contract without the condition as to residence in subsequent years. Evans *v.* U. S. Co., 64 N. Y. 304, 309 (1876).

[1] Performance of a condition that insured should be north of a certain line by a certain time, held excused by a severe sickness that came upon him while returning from south of that line. This on the ground that performance was wholly personal, and did not admit of employing agency. Baldwin *v.* N. Y. Co., 3 Bosw. 530 (1858). Said in Wheeler *v.* Conn. Mutual Co., 82 N. Y. 543. 552 (1880), to have been overruled by Evans *v.* U. S. Co., 64 N. Y. 304. In the case in 64 N. Y., however, there was no effort to return.

[2] Thus a mere cut on the face, finger or on any part of the body, from which blood flows, is not a "hurt" or "wound" in this sense. Bancroft *v.* Home Benefit Assoc., 120 N. Y. 14 (1890).

[3] (Union Mutual) Co. *v.* Wilkinson, 13 Wall. 222 (1871), where the applicant answered "no" to the question whether she had ever had a "serious personal injury;" but it appeared that she had fallen from a tree ten years before. Held, not error to charge that if the effects were temporary and had entirely passed away before the application was taken, and did not affect the health or shorten the life of applicant, its non-disclosure was no defense. The same was held in an action by

§ 41. **Effect of self-destruction when not provided against in the contract.**—If performance by the insurer is in general terms conditioned on the *death* of the insured, there seems no valid reason why death by committing suicide should not be included, and such is the general doctrine.[1]

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the same plaintiff on another policy, with reference to the answer "no" to the question whether she had "ever met with any accident or serious injury." Wilkinson *v.* Conn. Mutual Co., 30 Iowa, 119 (1870). The rule in Union Mutual Co. *v.* Wilkinson was approved and applied in Miller *v.* Confederation Co., 14 Ontario App. 218, 228 (1886), which was affirmed in Confederation Assoc. *v.* Miller, 14 Canada Supm. Ct. 330 (1887). And see Moore *v.* Conn. Mutual Co., 6 Canada Supm. Ct. 695, 697 (1879); Snyder *v.* Mutual Co., 3 Ins. L. J. 579, 607 (1874). An inquiry whether applicant "had ever had any illness, local disease or injury in any organ," having been answered in the negative, held not conclusive evidence of fraud, that he omitted to mention a temporary injury to the eye by sand being thrown into it, which had produced inflammation six years before the application, and which was then cured. Fitch *v.* American Popular Co., 59 N. Y. 557, 571 (1875). In Home Mutual Assoc. *v.* Gillespie, 110 Pa. St. 84 (1885), the principle of construing the contract liberally in favor of the insured was carried to what was, to say the least, an extreme limit. The insured having answered in the negative the questions whether he had been "subject to or had any of the following disorders or diseases, . . . open sores, lumps or swellings of any kind," also whether he had ever had "any malformation, illness or injury, or undergone any surgical operation," a verdict in his favor was sustained, notwithstanding evidence that he had in battle been struck on the leg by a piece of a shell, from which resulted ulcers.

In Co-operative Assoc. *v.* Leflore, 53 Miss. 1, 19 (1876), as bearing on the question whether the omission of the applicant to speak of an injury received in a railroad accident, was because she deemed it insignificant or because she desired to conceal a knowledge of it, held, error to exclude evidence that she had commenced a suit against the railroad company for the injury.

[1] Darrow *v.* Family Fund Soc., 116 N. Y. 537, 542 (1889); Fitch *v.* American Popular Co., 59 N. Y. 557, 573 (1875); Patrick *v.* Excelsior Co., 67 Barb. 202 (1875); Northwestern Benev. Assoc. *v.* Wanner, 24 Ill. App. 357 (1887); Mills *v.* Rebstock, 29 Minn. 380 (1882). To the contrary, however, Supreme Commandery Knights Golden Rule *v.* Ainsworth, 71 Ala. 436, 447 (1882); and see Hartman *v.* Keystone Co.,

A fortiori is this true of self-destruction by an insane person.[1] But this rule is subject to the reasonable limitation that one effecting the insurance *with intent to commit suicide*, and committing suicide in pursuance of such intent, is guilty of a fraud that will avoid the contract, even though it contain no provision as to suicide.[2]

§ 42. **Effect of exception of death by suicide.**—Contracts of insurance have very commonly contained provisions excepting from the risk, death by suicide. The common provision at first was, that the contract should be avoided if the insured should "die by his own hand." It may, however, be observed in passing, that this expression, as used in contracts of insurance, is regarded as synonymous with the expressions "die by suicide,"[3] "commit suicide,"[4] "take his own life,"[5] and the like; so what we hereafter, state as to the effect of the expression "die by his own hand," applies equally to these others. Probably no other question in the law of life insurance has been discussed so extensively and with such contrariety of result, as the

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21 Pa. St. 466, 479 (1853); and compare American Co. *v.* Isett, 74 Pa. St. 176 (1873). As to effect of condition against "violation of law," see § 48.

[1] Horn *v.* Anglo-Australian Co., 30 L. J. Ch. 510 (1861).

[2] Smith *v.* National Benefit Society, 123 N. Y. 85 (1890). As to contract being invalid as offering an encouragement to suicide, see Moore *v.* Woolsey, 4 El. & Bl. 243 (1854).

[3] Cooper *v.* Mass. Mutual Co., 102 Mass. 227 (1869); Bigelow *v.* Berkshire Co., 93 U. S. 284 (1876); Accident Co. *v.* Crandal, 120 U. S. 527, 531 (1887); Schultz *v.* Ins. Co., 40 Ohio St. 217 (1883); Blackstone *v.* Standard Co., 74 Mich. 592, 605 (1889); Phadenhauer *v.* Germania Co., 7 Heisk. (Tenn.), 567, 573 (1872). And the doctrines apply, *mutatis mutandis*, to the expression "self-inflicted injury." Accident Co. *v.* Crandal, above.

[4] Clift *v.* Schwabe, 3 C. B. 437 (1846); Dufaur *v.* Professional Co., 25 Beavan, 599 (1858).

[5] Supreme Commandery Knights Golden Rule *v.* Ainsworth, 71 Ala. 436, 448 (1882).

question of the significance to be attached to this term. It seems universally agreed that its meaning is limited to *intentional* self-destruction, thus excluding cases of accident and uncontrollable impulse.[1] For clearly it is an *act* on the part of the insured that is contemplated, and such *act* implies a *will* behind the act; in other words a *voluntary* act is contemplated.[2] Perhaps it scarcely needs adding that this implies a will to do *the act that actually was done*, and not some other essentially distinct act; in other words, that the actor realized that the result was what in the natural course of things it would be. And it is a matter of regret that the definition could not have been allowed to rest here, and that so many courts, swayed, it would seem, by a natural sympathy for the insured as against the insurer, have done so much to obscure the significance of the term, by the introduction of a further and subtler element into its definition. As it is, the weight of authority is decidedly to the effect that the expression "die by his own hand" involves, not only the idea that the act of self-destruction was *voluntary*, but that it was accompanied with a disability to *distinguish right from wrong*, or, as it has been expressed, *to understand its moral aspect and character.* That is to say, if the insured voluntarily kills himself by shooting himself through the heart, *firmly believing that the act of pulling the trigger is morally right*, but also fully aware that his death will, in the natural course of things, result from such act, the contract is, according to what we regard as the better view, avoided, if it contains the exception in question.[3] But, according to the

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[1] See §§ 46, 47.

[2] A verdict against the insurer held not vitiated by a finding of *suicide*, without a farther finding that it was *voluntary*. John Hancock Mutual Co. *v.* Moore, 34 Mich. 41 (1876).

[3] The view for which we contend, that this exception covers *all cases of intentional self-destruction*, is supported by an array of authority that is at least respectable, including, as it does, the decisions

view supported by the weight of authority, it is not avoided, inasmuch as the insured (erroneously) believed his act to be morally right.[1]

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of the courts of England, New York and Massachusetts. Borradaile v. Hunter, 5 Scott, N. R. 418 (1842), where the contract was held avoided on proof that the insured drowned himself, "knowing at the same time that he should thereby destroy his life, and intending thereby to do so, but being, at the time of committing the act, not capable of distinguishing between right and wrong." See Dormay v. Borrodaile, 10 Beavan, 335 (1847). So in Clift v. Schwabe, 3 C. B. 437 (1846); Dufaur v. Professional Co., 25 Beavan, 599 (1858); Van Zandt v. Mutual Benefit Co., 55 N. Y. 169 (1873); Weed v. Mutual Benefit Co, 70 N. Y. 561 (1877); Meacham v. N. Y. State Mutual Benefit Assoc., 120 N. Y. 237 (1890); Dean v. American Mutual Assoc., 4 Allen (Mass.), 96 (1862). The doctrine as thus laid down in N. Y. limits the doctrine that had been laid down in Breasted v. Farmers' Loan and Trust Co., 8 N. Y. 299 (1853); previous decision in 4 Hill, 73 (1843).

[1] The rule that the exception does not cover cases of intentional self-destruction where there is a failure to understand the moral aspect and character of the act, was thus set forth in (Mutual) Co. v. Terry, 15 Wall. 580, 591 (1872): "If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, *but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit*, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is not liable." And this may, undoubtedly, be regarded as the rule followed or recognized in the following authorities: (Charter Oak) Co. v. Rodel, 95 U. S. 232 (1877); Manhattan Co. v. Broughton, 109 U. S. 121 (1883); Accident Co. v. Crandal, 120 U. S. 527, 531 (1887); Conn. Mutual Co. v. Groom, 86 Pa. St. 92 (1878); Life Assoc. of America v. Waller, 57 Ga. 533 (1876); Phadenhauer v. Germania Co., 7 Heisk. (Tenn.), 567 (1872); Waters v. Conn. Mutual Co., 2 Fed. Rep. 892 (1880); Moore v. Conn. Mutual Co., 1 Flippin, 363 (1874); Blackstone v. Standard Co., 74 Mich. 593, 610 (1889; where the authorities are elaborately examined); Schultz v. Ins. Co., 40 Ohio St. 217 (1883; so held, though the condition was, "shall *under any circumstances* die by his own hand); New Home Assoc. v. Hagler, 29 Ill. App. 437 (1888; so held, though the condition was, "shall die by reason of

§ 43. **Effect of exception of death by suicide while insane.**— The effect of the judicial construction put upon the expression " die by his own hand," led to the addition to such expression, of the words "sane or insane," or their equivalent. This seems universally interpreted as at least including all cases of intentional self-destruction.[1] But by

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any act of self-destruction whatever"). In Scheffer *v.* National Co., 25 Minn. 534 (1879), the court approved a charge that the killing was not a "dying by his own hand," if the reason of insured was so far overthrown that he had not the power or capacity to exercise it upon the act he was about to commit; if he did not understand, or if he did understand and appreciate the effect of the act, but was driven to it by an uncontrollable impulse caused by insanity. This leaves the position of the court somewhat doubtful on the main question. The question was left open in American Co. *v.* Isett, 74 Pa. St. 176 (1873). Compare Hartman *v.* Keystone Co., 21 Pa. St. 466, 479 (1853). It seems not clear what the position of the court was on the main question in Merritt *v.* Cotton States Co., 55 Ga. 103 (1875). See in Adkins *v.* Columbia Co., 70 Mo. 27 (1879), a criticism on the language used in Mutual Co. *v.* Terry. The decision in Gay *v.* Union Mutual Co., 9 Blatchf. 142 (1871), so far as inconsistent with the doctrine stated, must be regarded as overruled.

Allegation that insured did "immorally, wrongfully, wickedly and fraudulently, and of his own volition, commit suicide." held a sufficient allegation that he committed suicide while sane. Northwestern Benev. Assoc. *v.* Bloom, 21 Ill. App. 159 (1886; where condition was merely against "suicide").

[1] Streeter *v.* Western Union Mutual Soc., 65 Mich. 199 (1887). So of "self-destruction, felonious or otherwise." Riley *v.* Hartford Co., 25 Fed. Rep. 315 (1885). So of "dying by his own act or intention, whether sane or insane." Adkins *v.* Columbia Co., 70 Mo. 27 (1879); Mutual Benefit Co. *v.* Daviess, 87 Ky. 541 (1888; "while insane"); Chapman *v.* Republic Co., 6 Bissell, 238 (1874). So of "dying by suicide, felonious or otherwise, sane or insane." Pierce *v.* Travelers' Co., 34 Wis. 389 (1874); Scarth *v.* Security Mutual Co., 75 Iowa, 346 (1888). But not of "dying by his own hand or act, voluntarily or otherwise." Jacobs *v.* National Co., 1 MacArthur (D. C.), 632, 641 (1874). Under this doctrine, where, in an action on a contract containing this exception ("die by suicide, sane or insane"), the killing was set up as a defense, a replication, setting up that "at the time when he inflicted said

at least one of the courts that had interpreted the expression "dying by his own hand," as already including all cases of intentional self-destruction, the enlarged expression is interpreted as even including self-destruction under the influence of *an uncontrollable impulse*,[1] though not self-destruction by *accident*.[2] *A fortiori*, would self-destruction by accident be excluded by courts adopting the more restricted interpretation above referred to.[3]

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wound, he was of unsound mind, and wholly unconscious of his act," was held bad. Bigelow *v.* Berkshire Co., 93 U. S. 284 (1876); S. P. of a replication setting up that at the time the insured "was of unsound mind, wholly and entirely unconscious of the physical and moral consequence of the act, and was the subject of an insane impulse which he had no power to resist." Suppiger *v.* Covenant Mutual Co., 20 Bradw. (Ill.), 595 (1886). As to whether accident leading to insanity can be held to be producing cause of death resulting from suicide while insane, see Streeter *v.* Western Union Mutual Co., 65 Mich. 199 (1887). As to repugnancy of provision excepting death by suicide while insane, see Salentine *v.* Mutual Benefit Co., 24 Fed. Rep. 159 (1885).

[1] De Gogorza *v.* Knickerbocker Co., 65 N. Y. 232 (1875). Here "dying by one's own hand, sane or insane," was, according to the rule laid down by a majority of the court, held to include "death resulting from any physical movement of the hand or body of the assured, proceeding from a partial or total eclipse of the mind." This goes to the extreme limit of the doctrine, for it is said (p. 237): "In this case we assume that the assured was to the very last degree mad or insane, so that the mere act of self-destruction was wholly involuntary." The decision was made by three judges against two.

[2] Thus, in case of taking poison through mistake or ignorance. Penfold *v.* Universal Co., 85 N. Y. 317 (1881), where, indeed, the expression used in the contract was "voluntary or otherwise," instead of "sane or insane," but the difference is regarded by the court as immaterial.

[3] Pierce *v.* Travelers' Co., 34 Wis. 389 (1874; dictum); Edwards *v.* Travelers' Co., 20 Fed. Rep. 661 (1884; "voluntary or involuntary"); Keels *v.* Mutual Reserve Fund Assoc., 29 Fed. Rep. 198 (1886; "voluntary or involuntary, sane or insane"). Thus, where insured in a state of mental and physical weakness took an overdraught of whiskey. Northwestern Mutual Co. *v.* Hazelett, 105 Ind. 212, 218 (1885).

§ 44. **Evidence of suicide.**—The question whether in any given case a death is or is not the result of suicide, is obviously one of fact.[1] The only limitation of this rule seems to be, that where the facts proved with reference to the mode of death, admit equally of the inference that the death was the result of accident, or of a suicidal act, the finding shall be that the death was accidental, the presumption being that the instinct of self-preservation will keep a person from attempting his own life.[2]

§ 45. **Evidence of insanity.**—As every man is presumed to

[1] Washburn *v.* National Accident Soc., 10 N. Y. Suppl. 366 (1890); Shank *v.* United Brethren Soc., 84 Pa. St. 385 (1877). As bearing on the question whether the death was accidental or suicidal, the circumstance of insured being or not being an infidel and atheist, held irrelevant. Gibson *v.* American Mutual Co., 37 N. Y. 580 (1868). So of his being a spiritualist. Continental Co. *v.* Delpeuch, 82 Pa. St. 225, 235 (1876).

[2] Mallory *v.* Travelers' Co., 47 N. Y. 52, 54 (1871); Washburn *v.* National Accident Soc., 10 N. Y. Suppl. 366 (1890); Travelers' Co. *v.* McConkey, 127 U. S. 661 (1888); Knickerbocker Co. *v.* Jordan, 7 Cin. L. Bull. 71 (1882); Continental Co. *v.* Delpeuch, 82 Pa. St. 225, 235 (1876); Phillips *v.* Louisiana Equitable Co., 26 La. Ann. 404 (1874); Travelers' Co. *v.* Sheppard, 12 Southeastern Rep. 18, 34 (Supm. Ct. Ga. 1890); Stormont *v.* Waterloo Co., 1 Foster & F. 22 (1858); Macdonald *v.* Refuge Co., 17 Scotch Session Cases, 4th series, 955 (1890). See Keels *v.* Mutual Reserve Fund Assoc., 29 Fed. Rep. 198 (1886); Snyder *v.* Mutual Co.. 3 Ins. L. J. 579 (1874). But held error to charge in case of one found dead by shooting, that the *law presumed* "that he did not die by his own hands, and that he did not intentionally kill himself." Mutual Benefit Co. *v.* Daviess, 87 Ky. 541 (1888). And in case of death from poisoning, held error to charge, "if the evidence leaves the matter *in doubt* whether the deceased came to his death by an act of self-destruction or by accident, the *law presumes* the death to have occurred by accident." Guardian Mutual Co. *v.* Hogan, 80 Ill. 35, 41 (1875). The decision in 87 Ky. seems hardly reconcilable with the authorities previously cited; but that in 80 Ill. undoubtedly is, the charge there being objectionable, as stating in effect that if there was under the evidence *any doubt* of the fact that the deceased destroyed himself, the law presumed the death to have occurred from accident.

be sane, the burden of proving insanity is on him who asserts it.[1] And it hardly needs saying that the fact of suicide is not of itself *sufficient* evidence of insanity,[2] though where there is *other* evidence tending to show insanity, the fact of suicide may properly be considered in connection with it.[3]

§ 46. **Effect of self-destruction under influence of uncontrollable impulse.**—As already stated, an exception of "dying by one's own hand" implies a voluntary act, and hence does not include self-destruction under the influence of an uncontrollable impulse. In other words, a person does not "die by his own hand," if he kills himself, being influenced thereto by an uncontrollable impulse.[4]

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[1] Supreme Commandery Knights Golden Rule *v.* Ainsworth, 71 Ala. 436, 449 (1882); Mutual Benefit Co. *v.* Daviess, 87 Ky. 541, 549 (1888). And it must be pleaded. Schultz *v.* Home Co., 4 Cin. L. Bull. 848 (1879). The question of insanity was held one for the jury, in John Hancock Mutual Co. *v.* Moore, 34 Mich. 41 (1876).

[2] Fowler *v.* Mutual Co., 4 Lans. 202 (1870); Weed *v.* Mutual Benefit Co., 70 N. Y. 561, 564 (1877); McClure *v.* Mutual Co., 55 N. Y. 651 (1873); Merritt *v.* Cotton States Co., 55 Ga. 103, 111 (1875); Knickerbocker Co. *v.* Peters, 42 Md. 414 (1875); Phadenhauer *v.* Germania Co., 7 Heisk. (Tenn.), 565, 577 (1872).

[3] Scheffer *v.* National Co., 25 Minn. 534, 536 (1879). Proof merely that decedent was insane at times is insufficient. He must be proved to have been insane at the time of the suicide. Knickerbocker Co. *v.* Peters, 42 Md. 414 (1875). As to declarations of insured as evidence of his insanity, see Hathaway *v.* National Co., 48 Vt. 335, 350 (1875), which also see as to non-expert evidence. In Van Zandt *v.* Mutual Benefit Co., 55 N. Y. 169, 179 (1873), it was held not within the scope of expert testimony to answer the question whether, "assuming that a person had the form of insanity which you would denominate melancholia, and had committed suicide, would you attribute that suicide to the disease?" Such a question calls for an inference that the jury themselves are capable of drawing. See also as to evidence of insanity, St. Louis Mutual Co. *v.* Graves, 6 Bush (Ky.), 268, 278, 290 (1869); (Charter Oak) Co. *v.* Rodel, 95 U. S. 232, 238 (1877); Meacham *v.* N. Y. State Mutual Benefit Assoc., 120 N. Y. 237 (1890).

[4] Or, as it is stated in Eastabrook *v.* Union Mutual Co., 54 Me. 224

§ 47. **Effect of self-destruction by accident.**—So again the exception of "dying by one's own hand," implying a voluntary act, does not include self-destruction by accident.[1]

§ 48. **Exception of death in violation of law.**—Somewhat akin to the exception of death by suicide is the exception of death "in violation of law,"[2] as it is commonly expressed, though this exception does not include suicide.[3] It is

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(1866), "as the result of a blind and irresistible impulse over which the will had no control." To same effect seem Newton *v.* Mutual Benefit Co., 76 N. Y. 426, 429 (1879); Hathaway *v.* National Co., 48 Vt. 335, 354 (1875); Knickerbocker Co. *v.* Peters, 42 Md. 414 (1875); Scheffer *v.* National Co., 25 Minn. 534 (1879). But in St. Louis Mutual Co. *v.* Graves, 6 Bush (Ky.), 268 (1869), the court were equally divided on the question whether "uncontrollable passion or emotion" has such effect, the judgment being on other grounds.

[1] Phillips *v.* Louisiana Equitable Co., 26 La. Ann. 404 (1874); Equitable Co. *v.* Paterson, 41 Ga. 338, 367 (1870); Supreme Commandery Knights Golden Rule *v.* Ainsworth, 71 Ala. 436, 448 (1882). Thus, where the death was the accidental result of taking a poisonous substance as medicine, held not within description of "self-destruction, whether voluntary or involuntary, and whether sane or insane at the time." Lawrence *v.* Mutual Co., 5 Bradw. (Ill.), 280 (1879). In a further decision in the same case, held that the ordinary rules as to *degrees* of negligence did not apply, and that the true inquiry was, whether the death was the proximate result of the negligent act of insured, and whether such act was under all the circumstances *culpable.* 8 Id. 488 (1881).

[2] Even in the absence of such an exception, the principle of *public policy* (a somewhat vague one, by the way) has been admitted to avoid an insurance contract, in case of the violation of law by the insured, though the limits of this application of the doctrine do not seem to have been very clearly defined. Thus, recovery not allowed where death resulted from voluntary submission to illegal operation which produced miscarriage. Hatch *v.* Mutual Co., 120 Mass. 550 (1876). So where insured was executed for a felony. Amicable Society *v.* Bolland, 2 Dow & Clark, 1 (1830).

[3] Patrick *v.* Excelsior Co., 67 Barb. 202 (1875; exception of "known" violation of law). So even under the N. Y. Penal Code, which makes *attempting* suicide a crime. Meacham *v.* N. Y. State Mu-

commonly coupled with the exception of "death by the hands of justice," an expression that of itself requires but little elucidation, though, on the principle of *noscitur a sociis*, it may sometimes serve to throw light on the construction of the accompanying expression.[1] Sometimes the form of the exception is "*in the known* violation of law," in which case it is clearly confined to cases where the act in question is known by the person performing it to be a violation of law;[2] though this addition seems of little practical importance, as but few cases are likely to arise under this condition, in which the act is not known to be such a violation. But the first question of importance relating to the construction of this exception is, whether it is confined to cases of violation of a *criminal* law. Although the term *law* is of itself broad enough to include the civil, as well as the criminal law, yet, taking into account the use of the word *violation*, and the evils intended to be guarded against by the introduction of this exception, it seems the better view that it should be confined to cases of violation of a *criminal* law.[3] A more

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tual Benefit Assoc., 120 N. Y. 237 (1890); Darrow *v.* Family Fund Soc., 116 N. Y. 537, 542 (1889). Compare Kerr *v.* Minnesota Mutual Assoc., 39 Minn. 174 (1888).

[1] See Harper *v.* Phœnix Co., note 3, below. The exception is then commonly in the form of an exception of death "by the hands of justice or in the (known) violation of law."

[2] Cluff *v.* Mutual Benefit Co., 13 Allen (Mass.), 308, 316 (1866). The same form of exception was under consideration in Bradley *v.* Mutual Benefit Co., below.

[3] Cluff *v.* Mutual Benefit Co., 13 Allen (Mass.), 308, 316 (1866), holding that a forcible taking of property under an ill-founded claim of legal right was not such violation. See further decision in 99 Mass. 317 (1868). See Bradley *v.* Mutual Benefit Co., 45 N. Y. 422, 427 (1871); Bloom *v.* Franklin Co., 97 Ind. 478, 481 (1884; which see as to mode of pleading such criminal act. The doctrine that such act must be a *criminal* one was here questioned, though it was not necessary to decide the question). At any rate, it seems clear that the exception should not be confined to *felonious* crimes, though in Harper *v.* Phœnix Co.

difficult question arises, however, in determining what is the test of death *in* the violation of law. Obviously the circumstances of any given case are so different in detail from those of any other case, that it is impracticable to lay down here other than a very general rule; and perhaps no better rule can be stated than that the act in violation of law, and the act causing death, must be part of "the same continuous transaction."[1] And it is not clear

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19 Mo. 506 (1854), the expression "shall die in consequence of a duel, or by the hands of justice, or in the known violation of any law of this State," held, on the principle of *noscitur a sociis*, to cover only *felonious* crimes. But in Wolff *v.* Conn. Mutual Co., 5 Mo. App. 236 (1878), the expression "shall die by suicide, or in consequence of the violation of any law, or shall be convicted of a felony," held not confined to *felonious* crimes.

[1] So laid down in Cluff *v.* Mutual Benefit Co., 13 Allen (Mass.), 308 (1866). The same rule was approved and applied in Bradley *v.* Mutual Benefit Co., 45 N. Y. 422 (1871), where insured met his death by being shot by a person with whose property insured was interfering, and where the evidence was held insufficient to justify dismissal of the complaint in an action on the contract. So the death was held not "in consequence of the violation of law," where insured was killed by a shot fired in provocation caused by an affray that had ended. Murray *v.* N. Y. Co., 19 Hun, 350, which was reversed on a question of pleading, in 85 N. Y. 236 (1881). But in a subsequent decision in 30 Hun, 428, 435 (1883), a judgment for the insurer was sustained, the court saying that if the acts of the insured were such as to produce in his slayer a high degree of passion, and while in such state he shot and killed the insured, "clearly his death was the natural consequence of the assault." This decision was affirmed in 96 N. Y. 614 (1884). So held a death "in consequence of the violation of law," where the insured was killed while in the act of committing an unprovoked assault upon another under circumstances that rendered the killing justifiable homicide. Wolff *v.* Conn. Mutual Co., 5 Mo. App. 236 (1878). On the other hand, held not a death "in the known violation of law," where insured was killed while retreating from an altercation that he had commenced, under circumstances that made such killing manslaughter. Harper *v.* Phœnix Co., 18 Mo. 109 (1853); 19 Mo. 506 (1854). So where he was killed in the lawful defense of his person, there being reasonable cause to apprehend a design to do him

that an essentially different rule need be applied where the exception is expressed as "*in consequence of* the violation of law;"[1] though, if there is any difference, an exception in the last-mentioned form would clearly admit of greater remoteness in time and distance.

§ 49. **Definition of "accident."**—Insurance against bodily

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a great personal injury, and also to apprehend immediate danger of such design being accomplished. Overton *v.* St. Louis Mutual Co., 39 Mo. 122 (1866). Held, not a "death in consequence of violation of law," where he was killed by the husband of a woman with whom he had been committing adultery, the killing taking place after the offense had been completed. Goetzman *v.* Conn. Mutual Co., 3 Hun, 515 (1875). But held a "death in the known violation of law," where he died in a few hours from wounds inflicted by the husband of a woman upon whom he was, at the time he was wounded, committing assault and battery. Bloom *v.* Franklin Co., 97 Ind. 478 (1884). The fact that a person was intoxicated at the time of the accident causing injury does not show that the injury happened "while engaged in, or in consequence of, any criminal act," even though such intoxication is a criminal act by statute. National Benefit Assoc. *v.* Bowman, 110 Ind. 355 (1886). So commission of suicide, to avoid arrest and trial for a crime, held not a death "in or in consequence of the violation of any criminal law." Kerr *v.* Minnesota Mutual Assoc., 39 Minn. 174 (1888). So death by being killed while attempting to escape arrest for robbery that had been committed, held not a death "while violating law." Griffin *v.* Western Mutual Assoc., 20 Nebr. 620 (1886). Where contract was to be void in case of death caused by "breach of the law on the part of the assured, or by his wilfully exposing himself to any unnecessary danger," held void where death was caused by leap from carriage while engaging in horse-race, illegal by statute. (Travelers') Co. *v.* Seaver, 19 Wall. 531 (1873). Threats made by the insured against a person with whom he afterward had a fight in which he lost his life, held improperly excluded, as bearing on the question whether his death happened by an unnecessary exposure to danger or while engaged in an unlawful act. Yale *v.* Travelers' Co., 2 T. & C. (N. Y.), 221 (1873). As to effect of acquittal of another person concerned in the transaction claimed to be a violation of law, see Cluff *v.* Mutual Benefit Co., 99 Mass. 317, 325 (1868).

[1] See Darrow *v.* Family Fund Soc., 116 N. Y. 537, 545 (1889); Bloom *v.* Franklin Co., 97 Ind. 478, 489 (1884), and cases above.

injury being commonly confined to *accidental* injuries, it becomes important to clearly define the term "accidental bodily injury." It may be defined as a bodily injury happening without the direct intent of the person injured,[1] even though it may be the indirect result of his intentional act.[2] It therefore includes an injury intentionally inflicted by another, also an injury that the negligence of the person injured contributed to produce.[3] And an accidental bodily injury frequently includes a chain or series of distinct causes or circumstances, even where some of such circumstances, considered separately, would not be regarded as accidental bodily injuries.[4] Of course an injury may be subsequent in time to another, without being in any way connected with it as an element of the chain of causation.[5] But the principle stated above has been frequently applied

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[1] In North American Co. *v.* Burroughs, 69 Pa. St. 43 (1871) it was defined as including "any unexpected event which happens as by chance, or which does not take place in the ordinary course of things."

[2] Thus in case of injury caused by jumping from platform. (U. S.) Mutual Accident Assoc. *v.* Barry, 131 U. S. 100, 121 (1889). So of strain happening while loading hay. North American Co. *v.* Burroughs, 69 Pa. St. 43 (1871). But not injury from jumping from railroad car in motion and running a considerable distance, but which action was not necessary for the safety of insured. Southard *v.* Railway Passenger Co., 34 Conn. 574 (1868; opinion of arbitrator). See as to injury happening while exercising with Indian clubs, McCarthy *v.* Travelers' Co., 8 Bissell, 362 (1878). Or while lifting burden, Martin *v.* Travelers' Co., 1 Foster & F. 505 (1859).

[3] See §§ 50, 51.

[4] Thus in case of a wound that did not of itself cause death, but did cause insured to fall into the water where he was drowned. Mallory *v.* Travelers' Co., 47 N. Y. 52 (1871). As to effect of provision that injury must be "proximate and sole cause" of injury for which recovery is sought, see McCarthy *v.* Travelers' Co., 8 Bissell, 362 (1878).

[5] Intemperance and injuries occurring after an accident, were held immaterial as to recovery for an injury resulting from such accident. Rhodes *v.* Railway Passenger Co., 5 Lans. 71, 76 (1871).

where bodily disease or condition is an element of the chain of causation,[1] though such disease or condition of itself does not come under the accepted definition of an accident.[2] On the other hand, by the terms of the contract, disease may be expressly excepted from the chain of causation.[3] And not only may an accidental bodily injury *include* a circumstance that would not of itself be regarded

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[1] Thus, "death from the effects of injury caused by accident," held to include death from pneumonia caused by a cold that would not have happened but for the weakened condition of insured produced by the accident. Isitt *v.* Railway Passenger Co., 22 L. R. Q. B. D. 504 (1889). So, "death proximately caused by physical injuries," held to cover death from apoplexy resulting from such injuries. National Benefit Assoc. *v.* Grauman, 107 Ind. 288 (1886). See Snyder *v.* Travelers' Co., 7 Ins. L. J. 23 (1878).

[2] Thus, sunstroke is not regarded as an accident. Sinclair *v.* Maritime Passengers' Co., 3 El. & Bl. 478 (1861).

[3] See McCarthy *v.* Travelers' Co., 8 Bissell, 362 (1878). Thus, death from accident "where such accidental injury was the direct and sole cause of death," held not to cover death from erysipelas caused by accidental injury, in view of a provision excepting death from "erysipelas or any other disease or secondary cause or causes arising within the system of the insured before or at the time of or following such accidental injury (whether causing such death directly or jointly with such accidental injury)." Smith *v.* Accident Co., 5 L. R. Exch. 302 (1870). An exception of death from "medical treatment for disease," held to cover death from overdose of opium that had been prescribed by physician. Bayless *v.* Travelers' Co., 14 Blatchf. 143 (1877). An exception of death from hernia held, in view of other provisions in the policy, not to cover death from hernia caused solely and directly by external violence, followed by a surgical operation performed for the purpose of relieving the patient. Fitton *v.* Accidental Death Co., 17 C. B. N. S. 122 (1864). As to effect of exception of "death accelerated or promoted by any disease or bodily infirmity or any natural cause arising within the system of the insured, whether accelerated by accident or not," see Cawley *v.* National Employers' Co., 1 Cababe & Ellis, 597 (1885). As to effect of provision for insurance against "bodily injury directly causing death," but with an exception of death arising from natural disease, "although accelerated by accident," see Anderson *v.* Scottish Accident Co., 17 Scotch Session Cases, 4th series, 6 (1889).

as an accidental bodily injury, but it may be the *result* of a circumstance that would not be so regarded.[1]

§ 50. "Accident" as including intentional injuries inflicted by another.—As we have seen, the idea of accident includes injuries intentionally inflicted by another person, such injuries being, as to the person injured, unintentional.[2] But injuries so inflicted by another are sometimes excepted from the contract, and are included, for instance, in an exception of "intentional injuries inflicted by the insured or any other person."[3]

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[1] As to injuries indirectly resulting from an intentional act, see note 2, p. 79. Injury "caused by accidental, external and visible means," held to cover death caused by being seized with an epileptic fit while crossing a stream and falling thereinto, and drowning there while suffering from the fit. So held, notwithstanding provision that insurance should not extend to "any injury caused by or *arising from* natural disease or weakness or exhaustion consequent upon disease." Winspear *v.* Accident Co., 6 L. R. Q. B. D. 42 (1880). And death from accident "where such accidental injury was the direct and sole cause of death," held to cover death caused by being seized with a fit and falling in front of a moving train, notwithstanding provision excepting death "arising from fits or any disease whatsoever, arising before or at the time or following such accidental injury, whether consequent upon such accidental injury or not, and whether causing such death directly or jointly with such accidental injury." Lawrence *v.* Accidental Co., 7 L. R. Q. B. D. 216 (1881).

[2] Supreme Council Chosen Friends *v.* Garrigus, 104 Ind. 133 (1885; injury received in a common law affray). So of condition against injury effected "through external, violent and accidental means." Phelan *v.* Travelers' Co., 38 Mo. App. 640 (1890); Hutchcraft *v.* Travelers' Co., 87 Ky. 300 (1888).

[3] DeGraw *v.* National Accident Soc., 51 Hun, 142 (1889; holding that such exception covered injuries resulting from a felonious and unprovoked assault); Travelers' Co. *v.* McConkey, 127 U. S. 661 (1888; murder); Phelan *v.* Travelers' Co., 38 Mo. App. 640 (1890; attempt to murder); Fischer *v.* Travelers' Co., 77 Cal. 246 (1888); Hutchcraft *v.* Travelers' Co. 87 Ky. 300 (1888); Travelers' Co. *v.* McCarthy, 25 Pacific Rep. 713 (Supm. Ct. Colo. 1891). Compare Bacon *v.* U. S. Mutual Accident Assoc., 44 Hun, 599, 604 (1887); which was reversed

§ 51. **"Accident" as including cases of contributory negligence.**—As we have seen, the idea of accident includes an injury that the negligence of the person injured contributed to produce.[1] But injuries so happening are frequently expressly excluded, as by providing that the insurance shall not cover injuries happening from "voluntary exposure to unnecessary danger."[2]

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in 123 N. Y. 304 (1890). But the mere fact that the insured has received an injury from another does not necessarily imply that such injury was intentional. Guldenkirch *v.* U. S. Mutual Accident Assoc., 25 N. Y. State Reporter, 945 (1889; shooting). As to effect of exception of death, the result of "design" on the part of another than insured, see Utter *v.* Travelers' Co., 65 Mich. 545 (1887).

[1] Schneider *v.* Provident Co., 24 Wis. 28 (1869); Provident Co. *v.* Martin, 32 Md. 310 (1869); Champlin *v.* Railway Passenger Co., 6 Lans. 71 (1872). To the contrary, it would seem, Morel *v.* Mississippi Valley Co., 4 Bush (Ky.), 535 (1868). See Tooley *v.* Railway Passenger Co., 3 Bissell, 399 (1873).

[2] This exception held to include death from being struck by railroad train while walking on track. Tuttle *v.* Travelers' Co., 134 Mass. 175 (1883). Crossing railroad trestle on dark, rainy night. Travelers' Co. *v.* Jones, 80 Ga. 541 (1888). Driving alone on dark night in a network of railroad tracks. Neill *v.* Travelers' Co., 12 Canada Supm. Ct. 55 (1885). But held not to cover death from stepping from train through hole in floor of bridge, the existence of which hole insured had no reason to suspect. Burkhard *v.* Travelers' Co., 102 Pa. St. 262 (1883). Or stepping from platform of moving railroad train while unconscious of what he was doing. Scheiderer *v.* Travelers' Co., 58 Wis. 13 (1885). Whether this exception covered case of railroad employe boarding moving train, held under the circumstances for the jury. Cotten *v.* Fidelity & Casualty Co., 41 Fed. Rep. 506, 511 (1890). See also as to the effect of this exception, Tucker *v.* Mutual Benefit Co., 50 Hun, 50 (1888); National Benefit Assoc. *v.* Jackson, 114 Ill. 533 (1885; death in course of employment); Mair *v.* Railway Passenger Co., 37 L. T. R. 356 (1877); Shaffer *v.* Travelers' Co., 31 Ill. App. 112 (1889). Exception of injury happening from "wilfully and wantonly exposing himself to any unnecessary danger or peril," held not to cover injury in consequence of getting from the platform at a railroad station upon the cars while in motion at a rate of speed less than that of a man walking. Schneider *v.* Provident Co., 24 Wis. 28 (1869). So of injury to railroad engineer by falling while attempting to pass from the tender of his

§ 52. **Exception of hazardous employment.**—Sometimes injuries happening in the course of a hazardous or dangerous employment or occupation are excepted from the risk.[1]

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engine to a car attached, the train being in motion at the rate of eight miles an hour. Provident Co. *v.* Martin, 32 Md. 310 (1869). Exception of injury from "voluntary exposure to unnecessary danger," and from a violation of a rule of the railroad company, held not to cover injury to railroad passenger from going out upon platform of moving train while overcome with heat or suffering from nausea. So held, notwithstanding a rule of the railroad company forbidding passengers to ride on the platform, it appearing that such rule was generally disregarded by both passengers and trainmen. Marx *v.* Travelers' Co., 39 Fed. Rep. 321 (1889). Exception of injury "happening from exposure to obvious risk," held to cover death from crossing railway track in front of approaching train. Cornish *v.* Accident Co., 23 L. R. Q. B. D. 453 (1889). As to effect of exception of injury from "trying to enter moving steam-vehicle," see Miller *v.* Travelers' Co., 39 Minn. 548 (1888); from "leaving cars in motion," Hall *v.* Equitable Accident Assoc., 41 Minn. 231 (1889). Exception of injury from "walking or being on the road-bed or bridge of any railway," held not to cover injury from stepping from train through hole in bridge. Burkhard *v.* Travelers' Co., above. As to whether "standing or walking on a railroad track or bridge" includes sitting or standing in a vehicle drawn by a walking horse along such track, see Neill *v.* Travelers' Co., 7 Ontario App. 570 (1882). Insurance against accident while traveling on the conveyance of a common carrier, provided insured complied with the rules and regulations of such carrier and exercised due diligence for self-preservation, held not to cover case of injury to passenger on railroad car who was thrown from the steps of the car where he stood while the train was approaching a station, in violation of a known rule of the company. Bon *v.* Railway Passenger Co., 56 Iowa, 664 (1881). As to exception of injury from lifting or over-exertion, see Reynolds *v.* Equitable Accident Assoc., 17 N. Y. State Reporter, 337 (1888). Under a provision that the insured use "all due diligence for personal safety and protection," held that the burden was on the insurer to show that he had not used all due diligence. Freeman *v.* Travelers' Co., 144 Mass. 572 (1887). As to evidence of use of all due diligence for personal safety and protection, see Stone *v.* U. S. Casualty Co., 34 N. J. Law, 371 (1871; fall from building).

[1] As to effect of provision limiting the liability of insurer to a less sum than that named in the contract should the insured be injured in any occupation or exposure classed as more hazardous than that specified in

It may be said generally that the idea of *employment* or *occupation* is interpreted as implying a somewhat continuous or habitual course of action in the line of such employment or occupation, and not to include a mere incidental act that, under a literal interpretation, might be so included.[1]

§ 53. **Effect of provisions defining means by which injury must be produced.**—The term "accident" being so broad in its scope, such scope is commonly restricted in insurance contracts. Thus a usual provision has been for insurance against injury occasioned by "*external, violent* and accidental means."[2] The circumstances that bring a case

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the contract, see Miller *v.* Travelers' Co., 39 Minn. 548 (1888). See also as to exception of dangerous employment or occupation, Tucker *v.* Mutual Benefit Co., 50 Hun, 50 (1888; wrecking); Knapp *v.* Preferred Mutual Co., 53 Hun, 84 (1889; where insured was described as retired gentleman).

[1] Thus, where the exception was of injury "while doing or performing any act or thing pertaining to an occupation classed as hazardous," and the occupation of "wood chopper" was so classed, and there was evidence that the insured, who was a stationary engineer, was injured while chopping wood for his own use, held for the jury to say whether the act he was doing or performing at the time of his death pertained to the occupation of "wood chopper." Eggenberger *v.* Guarantee Mutual Accident Assoc., 41 Fed. Rep. 172 (1889). Exception of "injury while temporarily or otherwise in another occupation more hazardous than" the one in which insured was engaged when insured, held not to cover injury to one insured as merchant, who received the injury while hunting for recreation, though the occupation of hunter was specified by the contract as more hazardous than that of merchant. Union Mutual Accident Assoc. *v.* Frohard, 25 Northeastern Rep. 642 (Supm. Ct. Ill. (1890). So held, though the certificate used the words "*act* or occupation classed as more hazardous," the classification made in the by-laws being, however, based on *occupations* and not on *acts*. Compare Neafie *v.* Manufacturers' Co., 55 Hun, 111 (1889).

[2] Insurance against death so occasioned has been held to include death from *unintentional poisoning*. Healy *v.* Mutual Accident Assoc., 25 Northeastern Rep. 52 (Supm. Ct. Ill. 1890); Paul *v.* Travelers' Co., 112 N. Y. 472, 479 (1889; breathing of poisonous gas). This last case

within such a provision are so varied that it seems impracticable to further define its effect. The same may be said of such expressions as "*accident or violence.*"[1]

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overruled Hill *v.* Hartford Accident Co., 22 Hun, 187 (1880), and is also opposed to Bayless *v.* Travelers' Co., 14 Blatchf. 143 (1877). But in accord with Paul *v.* Travelers' Co. seems U. S. Mutual Accident Assoc. *v.* Newman, 84 Va. 52 (1887), a case of inhalation of gas, where, however, the question of intent seems not to have been raised. The term has also been held to include death from drowning, Tucker *v.* Mutual Benefit Co., 50 Hun, 50 (1888); injury from diving into water and thereby causing rupture of tympanum of ear from contact with the water, Rodey *v.* Travelers' Co., 3 New Mexico, 316 (1886); death from a malignant pustule resulting from the touching of an abraded part of the thin part of the lips with a putrid animal substance, Bacon *v.* U. S. Mutual Accident Assoc., 44 Hun, 599, which was, however, reversed in 123 N. Y. 304 (1890), on the ground that the death was from "disease," death so caused being by the contract excepted. See, also, 20 N. Y. State Reporter, 204 (1888). The term has also been held to include death by a pistol shot fired by another, Guldenkirch *v.* U. S. Mutual Accident Assoc., 25 N. Y. State Reporter, 945 (1889); death from fright occasioned by the misbehavior of a horse that insured was driving, McGlinchey *v.* Fidelity & Casualty Co., 80 Me. 251 (1888; a very questionable decision); death from hanging while insane, Accident Co. *v.* Crandal, 120 U. S. 527, 533 (1887); death from cutting one's throat while insane, notwithstanding the contract excepted any injury "happening directly or indirectly in consequence of bodily infirmities or disease," it being held that though insanity is a bodily disease, yet the cause of the death was the killing, not the insanity, Blackstone *v.* Standard Co., 74 Mich. 592, 612 (1889). Under denial of plaintiff's allegation that the injury was occasioned "by external, violent or accidental means," but without averment that the injury was intentional, held that defense of *intentional* injury was not open, in view of the fact that the contract expressly excepted intentional injuries. Coburn *v.* Travelers' Co., 145 Mass. 226 (1887).

[1] This held to cover death from drowning. Trew *v.* Railway Passenger Co. 6 Hurlst. & N. 839 (1861). So where the insured fell in a shallow pool from sudden insensibility and was drowned. Reynolds *v.* Accidental Co., 22 L. T. R. 820 (1870). So "injury received through outward force and accidental means," held to include drowning while bathing. Knickerbocker Co. *v.* Jordan, 7 Cin. L. Bull. 71 (1882).

§ 54. **Sufficiency of evidence that injury was accidental.**—Especially in case of death, the cause of any injury is frequently incapable of more direct or positive proof than that derived from an inference from the effects. But even under a requirement that the proof be "direct and positive," the nature and character of the injury itself may be such as to furnish sufficient evidence, there being no presumption that the injury was intentionally inflicted, at least by the person injured.[1] Sometimes, however, the requirement as to proof is more explicit, as that the injury have been "caused by some outward and visible means."[2]

§ 55. **Insurance against injuries received while traveling.**—Sometimes the insurance is confined to injuries received while traveling. A term that has been commonly

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[1] So of requirement of "direct and positive" proof that death resulted from external, violent and accidental means; in case of a broken arm. Peck *v.* Equitable Accident Assoc., 52 Hun, 255, 259 (1889). Malignant pustule. Bacon *v.* U. S. Mutual Accident Assoc., 44 Hun, 599, 603 (1887). Pistol shot through the heart. Travelers' Co. *v.* McConkey, 127 U. S. 661 (1888). So even in case of shooting by another person. Utter *v.* Travelers' Co., 65 Mich. 545, 553 (1887). Purely *circumstantial* evidence held sufficient under Georgia statute. Travelers' Co. *v.* Sheppard, 12 Southeastern Rep. 18, 34 (Supm. Ct. Ga. 1890). As to burden of proof on insured under such condition, see Travelers' Co. *v.* McConkey, above (p. 666). The evidence held insufficient in Tennant *v.* Travelers' Co., 31 Fed. Rep. 322 (1887).

[2] This requirement held, in view of other provisions in the contract, to apply, not to injuries causing death, but only to such as entitled insured to certain sums during their continuance. Mallory *v.* Travelers' Co., 47 N. Y. 52, 56 (1871). So of a like provision as to injuries of which there should be "no external and visible sign upon the body." Paul *v.* Travelers' Co., 112 N. Y. 472, 476 (1889); McGlinchey *v.* Fidelity & Casualty Co., 80 Me. 251 (1888). And so held of an exception of "injuries of which there is no visible mark on the body of the insured." Eggenberger *v.* Guarantee Mutual Accident Assoc., 41 Fed. Rep. 172 (1889). See, however, U. S. Mutual Accident Assoc. *v.* Newman, 84 Va. 52, 62 (1887); Whitehouse *v.* Travelers' Co., 7 Ins. L. J. 23 (1877).

used is, "insurance while traveling by public or private conveyance provided for the conveyance of passengers."[1]

§ 56. Exception of death from poison.—A common exception from the risk is of death "caused by the taking of poison." This covers unintentional as well as intentional poisoning.[2]

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[1] This has been held to cover injury from fall on a sidewalk while *walking* from a steamboat landing to a railway station, as was usual for travelers on that route. So held, though there were hacks by which insured might have ridden, it appearing that it was the general custom to walk. Northrup *v.* Railway Passenger Co., 43 N. Y. 516 (1871); also an injury occurring while getting into a public conveyance for the purpose of traveling. Champlin *v.* Railway Passenger Co., 6 Lans. 71 (1872). Clearly wrong is Brown *v.* Railway Passenger Co., 45 Mo. 221 (1870), where it was held to cover the case of a railroad engineer killed on his locomotive. Injury received "while actually traveling in a public conveyance provided by common carriers and in compliance with all rules and regulations of such carriers," held to cover injury received while getting on or off a train. Tooley v. Railway Passenger Co., 3 Bissell, 399 (1873). So injury "happening from railway accident while traveling in any first-class carriage on any line of railway," held to cover injury received from slipping off the step of the carriage while stepping out of it upon the arrival at the destination of insured, there being no negligence. Theobold *v.* Railway Passenger Co., 10 Exch. 45 (1854). Of course *walking* is not "traveling by public or private conveyance." Ripley *v.* Ins. Co., 16 Wall. 336 (1872).

[2] Hill *v.* Hartford Accident Co., 22 Hun, 187 (1880); Pollock *v.* U. S. Mutual Accident Assoc. 102 Pa. St. 230 (1883); Cole *v.* Accident Co., 61 L. T. R. 227 (1889). But held not to apply to death from a malignant pustule resulting from the touching of an abraded part of the thin part of the lips with a putrid animal substance. In such case the word poison is used in its ordinary meaning, of a substance taken internally, seriously injurious to health and often fatal to life. Bacon *v.* U. S. Mutual Accident Assoc., 44 Hun, 599 (1887); 20 N. Y. State Reporter, 204 (1888). The decision in 44 Hun was reversed in 123 N. Y. 304 (1890), on the ground that death was from "disease," death so caused being by the contract excepted. In U. S. Mutual Accident Assoc. *v.* Newman, 84 Va. 52 (1887), the evidence that coal gas was poison, was held insufficient to invalidate a recovery for death resulting from inhalation of such gas. An exception of death caused by the "*inhaling* of gas," was held not to cover the involuntary *breathing* of gas. Paul *v.* Travelers' Co., 112 N. Y. 472, 478 (1889).

CHAPTER IV.

THE BENEFICIARY.

NOTE ON STATUTORY PROTECTION OF RIGHTS OF BENEFICIARY.

§ 57. **The insured as beneficiary.**—Allusion has already been made to the circumstance that the contract of insurance entered into between the insurer and the insured, is frequently for the benefit of a third person called the beneficiary.[1] But, for the sake of simplicity, we have hitherto assumed the insured and the beneficiary to be the same person; in other words, that the insured takes out the insurance for his own benefit.[2] In such case, how-

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[1] See § 6.

The right of the beneficiary is ordinarily complete, notwithstanding the insurer retains the policy in his possession and pays the premiums. Weston *v.* Richardson, 47 L. T. R. 514 (1882). See also § 74.

As to effect of covenant to answer questions to enable insurance to be taken out by a third person, and to perform the conditions in the contract, see Vyse *v.* Wakefield, 6 Mees. & W. 442 (1840).

As to effect of policy as *advancement*, see Rickenbacker *v.* Zimmerman, 10 So. Car. 110 (1877).

[2] "While one cannot insure a life in which he has no interest, every person can insure his own life for any sum upon which he can agree with an insurance company." Olmsted *v.* Keyes, 85 N. Y. 593, 598 (1881).

His interest in his own life is presumed, even though the insurance be for a limited time. Wainewright *v.* Bland, 1 Moody & R. 481, 488 (1835).

As to insurance by married woman for her own benefit, under R. I. statute, see McQuitty *v.* Continental Co., 15 R. I. 573, 577 (1887).

It is to be noted that the *form* of the contract does not always determine whether it is for the benefit of the insured. Thus in Rawls *v.* American Mutual Co., 27 N. Y. 282, 287 (1863), a contract *in form* with A on his own life, the loss being made payable to B, his creditor, was held *in effect* a contract with B, it appearing that B took the initiatory steps for procuring the insurance; that the application stated it to be for his benefit; that he paid the original and all subsequent premiums; that the policy was delivered to him, and that he sued on it as the party in interest. Conversely, a contract for insurance on a husband's life, made nominally with a wife, held, under the circumstances, to be in reality with the husband, it appearing that the consideration moved from him, and, he having survived her, his personal representatives were allowed to recover. Mutual Benefit Co. *v.* Atwood, 24 Gratt. (Va.), 497, 509 (1874). But in Triston *v.* Hardey, 14 Beavan, 232 (1851), where the

ever, if performance by the insurer is conditioned on the death of the insured, it is obviously his personal representative that actually obtains the benefit, in other words, is the beneficiary.[1]

§ 58. **Necessity of insurable interest.**—If, however, the contract of insurance is for the benefit of another than the insured, there seems on principle no reason why it should not be governed by the rules applicable to contracts generally, as to who may obtain the benefit thereof. In such case there is ordinarily no restriction as to the class of persons that may obtain such benefit. But in the case of contracts of insurance, there has become established a false, artificial and confusing restriction as to the class of persons that may obtain the benefit of such a contract. That is to say, the doctrine is, that *the beneficiary must have an insurable interest in the life of the insured.*[2] This doctrine is based on the supposition that it is contrary to public policy, that one person should have an expectation of a benefit conditioned on the happening of the death of another; that the temptation to destroy the life of such other, in order to obtain such benefit, must be balanced, or

contract was directly with the beneficiary, the mere circumstance that the insured paid some of the premiums, was held not to make the contract for his benefit, as against the beneficiary. See Abell *v.* Penn Mutual Co., 18 W. Va. 401, 421 (1881).

[1] Washington Central Bank *v.* Hume, 128 U. S. 195, 204 (1888); Union Mutual Co. *v.* Stevens, 19 Fed. Rep. 671, 676 (1883); Winterhalter *v.* Workmen's Guarantee Fund Assoc., 75 Cal. 245 (1888). See, however, under Iowa statute, Rhode *v.* Bank, 52 Iowa, 375 (1879); Newman *v.* Covenant Mutual Assoc., 76 Iowa, 56 (1888); under Maine statute, Hathaway *v.* Sherman, 61 Me. 466 (1872); Hamilton *v.* McQuillan, 82 Me. 204 (1889).

[2] As we shall see hereafter, however (§ 60), this doctrine is applied only to cases where the beneficiary contracts directly with the insurer, and not to cases where the insured himself makes the contract. But this distinction seems scarcely less artificial and groundless than the doctrine itself.

counteracted, as it were, by the existence of an *insurable interest* in his life. But the theory that it is contrary to public policy, that one person should have an expectation of a benefit conditioned on the happening of the death of another, finds little, if any, support from the rules applied to analogous cases; for it is just this expectation that exists in case of a devise or legacy, or in case of dower and other life tenancies; yet it never seems to have been seriously suggested that on that ground devises, legacies or life tenancies are invalid, as contrary to public policy.[1]

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[1] A striking illustration of the view maintained in the text, that the supposed justification of the doctrine of the necessity of an insurable interest, is equally applicable to invalidate a devise, or legacy, or life tenancy, is obtained from comparing Riggs *v.* Palmer, 115 N. Y. 506 (1889), with N. Y. Mutual Co. *v.* Armstrong, 117 U. S. 591 (1886). In the former case, the rights of a beneficiary under a *will* were held destroyed by the fact of his taking the life of the person on whose death the expectant benefit was conditioned. In the latter, the rights of a beneficiary under an *insurance contract* were held destroyed by the fact of his taking the life of the person on whose death the expectant benefit was conditioned.

The view maintained in the text is not without authority to support it. An insurable interest was regarded as unnecessary at common law, in Shannon *v.* Nugent, Hayes (Irish), 536 (1832); Schweiger *v.* Magee, Cooke & Alc. (Irish), 182 (1834); Trenton Mutual Co. *v.* Johnson, 4 Zabr. (N. J.), 576 (1854); De Ronge *v.* Elliott, 23 N. J. Eq. 486, 492 (1873); Vivar *v.* Supreme Lodge Knights of Pythias, 20 Atlantic Rep. 36 (Supm. Ct. N. J. 1890). See Mowry *v.* Home Co., 9 R. I. 346, 354 (1869); Chisholm *v.* National Capitol Co., 52 Mo. 213 (1873); Packard *v.* Conn. Mutual Co., 9 Mo. App. 469, 477 (1881). And the view that the ground of the doctrine is, that the absence of it would be an incentive to crime, was criticised in Rittler *v.* Smith, 70 Md. 261 (1889). And it is worthy of note that the doctrine, though commonly supposed to be a *common law* doctrine, is not, viewed in the light of its origin, a common law doctrine at all, being based on the construction of a statute directed against gambling. Of course, however, such construction furnishes no justification for the existence of the doctrine in a jurisdiction where neither that nor a substantially similar statute exists. Thus, the decisions in England and New York, at least, to

But the doctrine of the necessity of an insurable interest is so well established that we shall hereafter be obliged to assume its existence as a fundamental one in the law of life insurance.[1] Although the furnishing of preliminary proof of the existence of such interest, before bringing an action on the contract, is not requisite, unless made so by the contract,[2] yet, in an action on the contract, its existence is an indispensable part of plaintiff's case, and must be pleaded as well as proved.[3] Nor does the fact that the insurer entered into the contract upon the representation of the applicant that he had an interest, dispense with

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the effect that an insurable interest is necessary, may be explained on the ground of the existence of such statutes, and, perhaps, if, in other jurisdictions where an insurable interest has been declared necessary, the question of the existence or non-existence of such a statute had always been considered, the decision of the question of insurable interest would frequently have been different.

[1] The doctrine of the necessity of an insurable interest was declared in Ruse *v.* Mutual Benefit Co., 23 N. Y. 516 (1861); Corson's Appeal, 113 Pa. St. 438 (1886); Keystone Mutual Benefit Assoc. *v.* Norris, 115 Pa. St. 446 (1886); Amick *v.* Butler, 111 Ind. 578, 581 (1887); Elkhart Mutual Assoc. *v.* Houghton, 98 Ind. 149 (1884); Whitmore *v.* Supreme Lodge Knights of Honor, 100 Mo. 36, 46 (1889); Helmetag *v.* Miller, 76 Ala. 183 (1884); Equitable Co. *v.* Paterson, 41 Ga. 338, 363 (1870). On this principle, a provision for payment to the member of a benefit society holding number *next to* number held by one who might die, was held void. People *v.* Golden Rule, 114 Ill. 34 (1885); Golden Rule *v.* People, 118 Ill. 493 (1886). And it has been declared that the defense of want of insurable interest is allowed in the public interest, not in the private interest of the insurer. Mutual Benefit Assoc. of Michigan *v.* Hoyt, 46 Mich. 473 (1881); Missouri Valley Co. *v.* McCrum, 36 Kans. 146 (1887).

[2] Miller *v.* Eagle Co., 2 E. D. Smith, 268, 282 (1854); Smith *v.* Ætna Co., 5 Lans. 545, 549 (1871); Grattan *v.* National Co., 15 Hun, 74, 77 (1878).

[3] Burton *v.* Conn. Mutual Co., 119 Ind. 207 (1889); Guardian Mutual Co. *v.* Hogan, 80 Ill. 35, 39 (1875); Singleton *v.* St. Louis Mutual Co., 66 Mo. 63, 75 (1877); though see, under Louisiana Code, Kennedy *v.* N. Y. Co., 10 La. Ann. 809 (1855).

the necessity of such pleading and proof,[1] though the objection of the want of it may be waived by the insurer, as by resisting the claim of the insured on a distinct ground.[2]

§ 59. **Definition of insurable interest.**—The doctrine of insurable interest resting on so unsubstantial a foundation, it has not unnaturally resulted that great difficulty has been experienced in reaching a consistent and comprehensive definition of what an insurable interest is, after all.[3]

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[1] Ruse *v.* Mutual Benefit Co., 23 N. Y. 516, 527 (1861); Ferguson *v.* Mass. Mutual Co., 22 Hun, 320, 325 (1884).

[2] Cannon *v.* Northwestern Mutual Co., 29 Hun, 470 (1883). And the objection was held not available on appeal, not having been set up by answer. Goodwin *v.* Mass. Mutual Co., 73 N. Y. 480, 496 (1878); Forbes *v.* American Mutual Co., 15 Gray (Mass.), 249, 255 (1860). See Missouri Valley Co. *v.* McCrum, 36 Kans. 146, 151 (1887).

[3] The unsatisfactory nature of the attempts to define an insurable interest is well illustrated by the following somewhat verbose and nebulous statement given by so justly eminent a jurist as Chief Justice Shaw. This definition of an insurable interest has perhaps been more frequently cited and applied than any other. "All which it seems necessary to show, in order to take the case out of the objection of being a wager policy, is, that the insured has some interest in the life of the *cestui que vie;* that his temporal affairs, his just hopes and well-grounded expectations of support, of patronage, and advantage in life, will be impaired; so that the real purpose is not a wager, but to secure such advantages supposed to depend on the life of another. Perhaps it would be difficult to lay down any general rule as to the nature and amount of interest which the assured must have." Loomis *v.* Eagle Co, 6 Gray (Mass.), 396, 399 (1856). In other words, after an elaborate attempt to define an insurable interest, he finally "gives it up." Nor does the following attempt seem to be more successful. "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation." Field,

Perhaps all that can be profitably laid down, as an established element of the definition, is, that it implies a pecuniary interest, either present or expectant, though even on this point the authorities are not unanimous. A convenient, though perhaps hardly substantial, distinction may be made between an insurable interest that is accompanied with family relationship, and an insurable interest not so accompanied.

§ 60. **Insurable interest unnecessary, where the contract is between insurer and insured.**—Assuming the soundness of the doctrine of insurable interest, it seems a proper limitation on the application of it, that where the insured himself makes the contract with the insurer, he may select as beneficiary one having no insurable interest.[1] This is

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J., in Warnock *v.* Davis, 104 U. S. 775 (1881). See also Conn. Mutual Co. *v.* Schaefer, 94 U. S. 457, 461 (1876); Corson's Appeal, 113 Pa. St. 438, 444 (1886).

[1] "It is abundantly settled in this State, that one who takes an insurance upon his own life, may make the policy payable to any person whom he may name in the policy, and that such person need have no interest in the life insured." Olmsted *v.* Keyes, 85 N. Y. 593, 599 (1881). To same effect, Tucker *v.* Mutual Benefit Co., 50 Hun, 50 (1889); Freeman *v.* National Benefit Soc., 42 Hun, 252, 256 (1886); Rawls *v.* American Mutual Co.. 27 N. Y. 282, 287 (1863); Mallory *v.* Travelers' Co., 47 N. Y. 52, 54 (1871); Massey *v.* Rochester Soc., 102 N. Y. 523 (1886); Sabin *v.* Grand Lodge A. O. U. W., 6 N. Y. State Reporter, 151 (1887); Campbell *v.* New England Mutual Co., 98 Mass. 381, 389 (1867); Cunningham *v.* Smith, 70 Pa. St. 450, 458 (1872); Scott *v.* Dickson, 108 Pa. St. 6 (1884); Vivar *v.* Supreme Lodge Knights of Pythias, 20 Atlantic Rep. 36 (Supm. Ct. N. J. 1890); Provident Co. *v.* Baum, 29 Ind. 236 (1867); Burton *v.* Conn. Mutual Co., 119 Ind. 207, 211 (1889); Milner *v.* Bowman, 119 Ind. 448, 454 (1889); Guardian Mutual Co. *v.* Hogan, 80 Ill. 35, 39 (1875); Bloomington Mutual Assoc. *v.* Blue, 120 Ill. 121 (1887); Lemon *v.* Phœnix Mutual Co., 38 Conn. 294, 300 (1871); Fairchild *v.* Northeastern Mutual Assoc., 51 Vt. 613, 625 (1879); Succession of Hearing, 26 La. Ann. 326 (1874); Equitable Co. *v.* Paterson, 41 Ga. 338, 365 (1870). See American Co. *v.* Robertshaw, 26 Pa. St. 189 (1856).

seemingly on the ground that, if the insurer himself chooses to place his life in a situation of hazard, there is no sufficient reason for preventing him from doing so,[1] though this is perhaps scarcely consistent with the declaration sometimes made, that the doctrine is upheld in the public interest, not in the private interest of the insured.[2] And we shall also see that this limitation has not been consistently extended in cases of assignment of the con-

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The language used in Gilbert *v.* Moose, 104 Pa. St. 74 (1883), seems hardly reconcilable with the prevailing doctrine. The inconsistency of this doctrine was clearly stated in Equitable Co. *v.* Hazlewood, 75 Tex. 338, 351 (1889). It was applied, notwithstanding the English statute against wager policies, in North American Co. *v.* Craigen, 13 Canada Supm. Ct. 278 (1886). It was applied to a case of designation of a beneficiary by a member of a benefit society, even though such beneficiary was designated in place of a beneficiary previously designated. Lamont *v.* Grand Lodge Iowa Legion of Honor, 31 Fed. Rep. 177 (1887). But to the contrary, see Knights & Ladies of Honor *v.* Burke, 15 Southwestern Rep. 45 (Ct. of App. of Tex. 1890). What was in form *an assignment* of the contract was, to carry out the intention of the parties, held a direction to the insurer to pay the loss to the apparent assignee, and the transaction was thus sustained on the principle indicated. Scott *v.* Dickson, 108 Pa. St. 6, 15 (1884). So in McFarland *v.* Creath, 35 Mo. App. 112, 122 (1889), a member of a benefit society having carried the insurance for some time for his own benefit, an indorsement by him on the back of his certificate, wherein he stated that he "assigned, transferred and set over his certificate" to another person who had no insurable interest in his life, was regarded, not as an assignment, but as a valid *designation.* So held, notwithstanding a provision in the by-laws, that no certificate should *issue* unless the beneficiary had an insurable interest in the life of the insured, such provision being merely declaratory of the general rule as to the necessity of insurable interest.

[1] One on whose life a policy had been taken out with his consent, payable at his death to a third person, was not allowed to maintain an action to compel its cancellation on his reimbursing the premiums paid, merely upon the ground that the beneficiary had no insurable interest and was hostile to him, there being no allegation of danger. Peckham *v.* Grindlay, 17 Abb. N. C. 18 (1885).

[2] See note 1, p. 92.

tract. Nevertheless, we assume the limitation above stated to be a generally accepted doctrine, nor does it necessarily fail of application, even though the beneficiary pay the premiums.[1] Yet it is obvious that by express agreement it may be essential that the beneficiary have an insurable interest.[2] And there seems a tendency on the part of some courts, while not openly repudiating the doctrine, to greatly limit its scope, by declaring that if the transaction is in fact a mere cover for a wager contract, the contract is void.[3]

§ 61. **Insurable interest accompanied with family relationship.**—Although the fact of the beneficiary having a family relationship to the insured, has appeared so frequently in connection with facts that have been held sufficient to establish an insurable interest, yet there is, perhaps, not a single respectable authority that directly holds that such

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[1] Langdon *v.* Union Mutual Co., 14 Fed. Rep. 272, 274 (1882); Fairchild *v.* Northeastern Mutual Assoc., 51 Vt. 613, 625 (1879; where, however, it was laid down that such payment is *presumed* to have been made as agent for the insured); Wainewright *v.* Bland, 1 Moody & R. 481 (1835). As to burden of proof in such cases, see Pfleger *v.* Browne, 28 Beavan, 391 (1860).

[2] Forbes *v.* American Mutual Co., 15 Gray (Mass.), 249, 255 (1860).

[3] Thus where the contract was for the benefit of a *sister* of the insured, the relationship was held sufficient to divest the transaction of the semblance of a wagering one. Ætna Co. *v.* France, 94 U. S. 561 (1876). So of a contract for the benefit of a *grandson.* Elkhart Mutual Assoc. *v.* Houghton, 103 Ind. 286 (1885). The doctrine stated in the text is also sustained by Amick *v.* Butler, 111 Ind. 578, 583 (1887); Brockway *v.* Mutual Benefit Co., 9 Fed. Rep. 249 (1881); Langdon *v.* Union Mutual Co., 14 Fed. Rep. 272 (1882); Shilling *v.* Accidental Death Co., 2 Hurlst. & N. 42 (1857); 27 L. J. Exch. 17 (1857); 1 Foster & F. 116 (1858); Wainewright *v.* Bland, 1 Moody & R. 481 (1835); Vezina *v.* N. Y. Co., 3 Legal News (Montreal), 322 (1880). The question whether it was such a cover, is for the jury. See cases cited; also, Swick *v.* Home Co., 2 Dillon, 160 (1873).

relationship, considered apart from pecuniary interest, is sufficient.[1] The rule as established by the weight of authority seems to be, that where the relationship is of such a character as to carry with it presumptive or conclusive evidence of a pecuniary interest, it is, presumptively or conclusively, as the case may be, evidence of the existence of an insurable interest, otherwise not. Thus the relationship of husband and wife carries with it conclusive evidence of the wife's pecuniary interest in her husband's life, he being under an obligation to support her.[2] So a minor child has an insurable interest in his father's life.[3] So the right that a father has to the earnings of his minor son conclusively shows the father's insurable interest in the son's life.[4] On somewhat more doubtful ground rest the cases where the relationship carries *presumptive* evidence of interest, but on this ground a brother has been held to presumptively have such interest in his brother's life,[5] and

[1] That mere relationship, apart from pecuniary interest, is insufficient to establish an insurable interest, was declared in Guardian Mutual Co. *v.* Hogan, 80 Ill. 35, 45 (1875); Charter Oak Co. *v.* Brant, 47 Mo. 419, 424 (1871); Singleton *v.* St. Louis Mutual Co., 66 Mo. 63, 74 (1877); Lewis *v.* Phœnix Mutual Co., 39 Conn. 100, 104 (1872); Mitchell *v.* Union Co., 45 Me. 104 (1858); Helmetag *v.* Miller, 76 Ala. 183 (1884; dictum); Rombach *v.* Piedmont & Arlington Co., 35 La. Ann. 233 (1883). See, however, Clemmitt *v.* N. Y. Co., 76 Va. 355, 360 (1882); Valley Mutual Assoc. *v.* Teewalt, 79 Va. 421 (1884). The doctrine is further set forth and illustrated in the cases cited in the notes below.

[2] The importance of this relationship, in this connection, seems to make separate treatment of it proper. See § 62.

[3] Shields *v.* Sharp, 35 Mo. App. 178, 183 (1889).

[4] Grattan *v.* National Co., 15 Hun, 74 (1878); Loomis *v.* Eagle Co., 6 Gray (Mass.), 397 (1856); Mitchell *v.* Union Co., 45 Me. 104 (1858; where son was also debtor). But held otherwise under English statute. Halford *v.* Kymer, 10 Barn. & C. 724 (1830). See Tucker *v.* Mutual Benefit Co., 50 Hun, 50 (1888).

[5] Lewis *v.* Phœnix Mutual Co., 39 Conn. 100, 104 (1872). But here the presumption was held overthrown by proof that there was, in fact, no pecuniary interest.

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a husband in his wife's life.[1] Again, there are the more numerous relationships that carry with them not even presumptive evidence of such interest. Thus a nephew has been held to have no such interest in the life of his aunt;[2] nor an uncle in that of his nephew;[3] nor an adult son in that of his father;[4] nor a step-son in that of his step-father;[5] nor a son-in-law in that of his mother-in-law;[6] nor a daughter in that of her mother;[7] nor a granddaughter in that of her grandfather.[8] And it would seem that on the same ground a sister has none in that of her brother,[9] and *vice versa*;[10] nor a father in that of an adult son.[11]

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[1] Currier *v.* Continental Co., 57 Vt. 496 (1885).

[2] Corson's Appeal, 113 Pa. St. 438 (1886).

[3] Singleton *v.* St. Louis Mutual Co., 66 Mo. 63 (1877).

[4] Guardian Mutual Co. *v.* Hogan, 80 Ill. 35, 45 (1875). In Valley Mutual Assoc. *v.* Teewalt, 79 Va. 421 (1884), it seems to be laid down that an adult son has, by virtue of his relationship merely, such interest in his father's life, but if this was so held, it is clearly unsound. The same view seems to have been taken in Reserve Mutual Co. *v.* Kane, 81 Pa. St. 154 (1876), but that case may be sustained on the ground that the son was there liable under the poor laws for his father's support.

[5] U. B. Mutual Aid Assoc. *v.* McDonald, 122 Pa. St. 324 (1888).

[6] Stoner *v.* Line, 16 W. N. C. (Pa.), 187 (1885); Rombach *v.* Piedmont & Arlington Co., 35 La. Ann. 233 (1883).

[7] Continental Co. *v.* Volger, 89 Ind. 572 (1883).

[8] Burton *v.* Conn. Mutual Co., 119 Ind. 207 (1889).

[9] She was held to have such an interest, in Lord *v.* Dall, 12 Mass. 115 (1815); Goodwin *v.* Mass. Mutual Co., 73 N. Y. 480, 497 (1878); but in the former case she was dependent upon him for support and education, and in the latter she had an interest as a creditor. As to sister's husband's interest, see Forbes *v.* American Mutual Co., 15 Gray (Mass.), 249 (1860).

[10] He was held to have such interest, in Keystone Mutual Assoc. *v.* Beaverson, 16 W. N. C. (Pa.), 188 (1885), but this was on the ground of the existence of the relation of debtor and creditor.

[11] See note 4, p. 97.

§ 62. **Insurable interest of wife in husband's life at common law.**—As previously stated, it seems settled that a wife has at common law an insurable interest in her husband's life,[1] and this seems to apply even where the rela-

[1] Brummer *v.* Cohn, 86 N. Y. 11, 14 (1881); Pullis *v.* Robison, 73 Mo. 201, 208 (1880); Gambs *v.* Covenant Mutual Co., 50 Mo. 44 (1872); Packard *v.* Conn. Mutual Co. 9 Mo. App. 469, 476 (1881); Goodrich *v.* Treat, 3 Colo. 408 (1877); Watson *v.* Centennial Mutual Assoc., 21 Fed. Rep. 698 (1884). And see Pingree *v.* Jones, 80 Ill. 177 (1875); Succession of Richardson, 14 La. Ann. 1 (1859); Reed *v.* Royal Exchange Co., Peake's Add. Cas. 70 (1795). See, however, Whitehead *v.* N. Y. Co., 102 N. Y. 143, 151 (1886); Charter Oak Co. *v.* Brant, 47 Mo. 419, 424 (1871). As to evidence of marriage, see Equitable Soc. *v.* Paterson, 41 Ga. 338 (1870). One who had married insured in good faith and borne him children, held to have an insurable interest, notwithstanding he had a prior undivorced wife living at his death. Estate of Mueller, 15 Pittsburgh L. J. 326 (1885). That insurance taken out by a husband in favor of his wife is presumptively intended as a provision for her after his death and not as security for a debt, see Weiss' Appeal, 19 Atlantic Rep. 311 (Supm. Ct. Pa. 1890). As to wife's interest in such contract depriving her of dower, etc., under Alabama statute, see Williams *v.* Williams, 68 Ala. 405 (1880); Harris *v.* Harris. 71 Ala. 536 (1882).

In this connection may properly be considered the cases having reference to the action of the husband as agent of the wife in negotiating the contract, though. as a matter of fact, some or all of these were cases of insurance provided for by statute.

The subsequent acceptance by a wife of a policy procured by her husband for her benefit, but without her authority, held to constitute a valid contract between her and the insurer. Thompson *v.* American Tontine Co., 46 N. Y. 674 (1871). And in case of a policy so taken out, the wife was held bound by the act of her husband in paying the premium by a note with conditions affecting the policy, instead of in cash. Baker *v.* Union Mutual Co., 43 N. Y. 283, 288 (1871). So, in case of a policy taken out by a wife on the husband's life on an application in which both joined, a false certificate made by him on the faith of which the policy was finally delivered to her, was held admissible in evidence against her. Estes *v.* World Mutual Co., 6 Hun, 349 (1876). In case of a policy purporting on its face to be with the wife as insured, though on the husband's life, held that he, in procuring the policy, in paying premiums, in receiving and acting on notices and the like, was simply her

tion has been merely prospectively created by contract.[1] The contract of insurance of a husband's life for a wife's benefit naturally contemplates her surviving him, but in case of his surviving her, the interest in the contract does not, as would naturally seem to be the case, pass to her representatives, but in accordance with the somewhat technical rule of the common law governing the disposition of a wife's choses in action, passes to the husband.[2] Of course, however, other disposition can be made by express agreement, and in many jurisdictions the disposition of such interest is governed by the statutes applicable to the disposition of the wife's personal property generally.[3]

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agent. Whitehead *v.* N. Y. Co., 102 N. Y. 143, 150 (1886). To similar effect, Jacob *v.* Continental Co., 1 Cin. (Ohio), 519 (1871).

A contract among married women whereby on the death of the husband of any of them, the others should pay a certain assessment toward forming a fund to be paid the widow, held not enforcible. Bruner *v.* Thiesner, 12 Mo. App. 289 (1882).

[1] A woman engaged to marry a man held to have an insurable interest in his life. Chisholm *v.* National Capitol Co., 52 Mo. 213 (1873).

[2] Olmsted *v* Keyes, 85 N. Y. 593, 601 (1881; where this rule was held not to have been changed in New York by the statutes in respect to insurances upon lives of husbands for the benefit of wives); Cole *v.* Knickerbocker Co., 63 How. Pr. 442 (1882; where this rule was said not to have been changed in Massachusetts by statute, and where Roe *v.* Mutual Co., 4 Bigelow, 254, was distinguished as a case where the wife had disposed of her interest by will). But in Swan *v.* Snow, 11 Allen (Mass.), 224 (1865), where the wife died leaving children, the interest was, under the statutes, held to pass to her administrator in trust for the children. For a peculiar case where the right to the insurance money depended, by the agreement, on whether the husband or the wife survived the other, and it was uncertain which survived, see Fuller *v.* Linzee, 135 Mass. 468 (1883). In Kerman *v.* Howard, 23 Wis. 108 (1868); Gambs *v.* Covenant Mutual Co., 50 Mo. 44 (1872), the right of the husband in the contract on his wife's death was sustained, not on the general doctrine as to choses in action, but on the rule approved by some authorities, allowing a change to be made by the insured who has paid premiums. See § 76.

[3] Mutual Aid Soc. *v.* Miller, 107 Pa. St. 162 (1884), and cases cited;

§ 63. **Insurable interest not accompanied with family relationship.**—Leaving now out of the view the cases into which the confusing element of family relationship has been introduced, we still find it difficult to frame an exact definition of the insurable interest necessary to support the contract. But, keeping perhaps somewhat within the definition,[1] it may be definitely stated that that relation of definite pecuniary obligation known as the relation of debtor and creditor is sufficient; that is to say, a creditor has an insurable interest in his debtor's life,[2] though whether

Hutson v. Merrifield, 51 Ind. 24 (1875); Harley v. Heist, 86 Ind. 196 (1882); Goodrich v. Treat, 3 Colo. 408 (1877). So in case of policy payable to the wife, her "executors, administrators and assigns." Deginther's Appeal, 83 Pa. St. 337 (1877).

[1] As an illustration of cases falling outside the relation of debtor and creditor, see Law v. London Indisputable Co., 24 L. J. Ch. 196 (1885), where a person entitled to receive a sum of money upon another person attaining a certain age, was held to have a sufficient interest in his life. So a tenant of a landlord having only a life interest in the land, was held to have such interest in his landlord's life. Sides v. Knickerbocker Co., 16 Fed. Rep. 650 (1883).

[2] Goodwin v. Mass. Mutual Co., 73 N. Y. 480, 497 (1878); Washington Central Bank v. Hume, 128 U. S. 195, 204 (1888); Mace v. Provident Assoc., 101 N. C. 122, 128 (1888): Godsall v Boldero, 9 East, 72 (1807); Von Lindenau v. Desborough, 3 Carrington & P. 353 (1828). See American Co. v. Robertshaw, 26 Pa. St. 189 (1856); Cooke v. Field, 19 L. J. Q. B. 441 (1850). In Tidswell v. Ankerstein, Peake, 151 (1792), an executor was held to have a sufficient interest in the life of a debtor of the testator. And in Garner v. Moore, 3 Drewry, 277 (1855), an executor who had without special authority insured the life of a debtor of the testator, but who dropped the insurance without special authority, was held liable to the estate for what would have been recovered on the policy if he had kept it up. In accordance with the general rule above stated, the interest was held sufficient in case of a debt due the creditor as a member of a partnership and from another partnership of which the debtor was a member. Rawls v. American Mutual Co., 36 Barb. 357, 361 (1862). So also, where the debt was due from a partnership of which the insured was a member. Morrell v. Trenton Mutual Co., 10 Cush. (Mass.), 282 (1852). So where the debtor was a partner of the creditor and had not paid in his promished amount of capital. Conn.

this extends to a mere moral obligation seems not clearly settled.[1] But though, to sustain the contract, it is not regarded as needful that the amount of the debt equal or even approximate the amount of the insurance, yet, if the amounts be grossly disproportionate, the contract is regarded as invalid, as being a mere wagering one.[2] It may be added, however, that the very looseness and indefiniteness of this exception goes far to show the utter unsoundness of the whole doctrine of insurable interest.

Mutual Co. *v.* Luchs, 108 U. S. 498 (1883). So where the earnings of the insured were to constitnte a part of joint funds in which the beneficiary was to share. Trenton Mutual Co. *v.* Johnson, 4 Zabr. (N. J.), 576 (1854). Compare Evers *v.* Life Assoc. of America, 59 Mo. 429 (1875); (Union Mutual) Co. *v.* Mowry, 96 U. S. 544 (1877). So where a person advanced the insured funds for the prosecution of a certain enterprise and it was agreed that he should have equal share in the profits of the enterprise. Miller *v.* Eagle Co., 2 E. D. Smith, 268, 289 (1854); Hoyt *v.* N. Y. Co., 3 Bosw. 440, 446 (1858); Bevin *v.* Conn. Mutual Co., 23 Conn. 244 (1854); Morrell *v.* Trenton Mutual Co., 10 Cush. (Mass.), 282 (1852; where, however, the consideration furnished by the creditor was labor instead of money). An agreement to employ for a certain time for a fixed compensation held to give a sufficient interest. Herdon *v.* West, 3 Best & Smith, 579 (1863). So a surety has a sufficient interest in the life of the principal obligor, and his right of recovery on the contract is not affected by the fact that no breach of the obligation has ever occurred. Scott *v.* Dickson, 108 Pa. St. 6 (1884). And one of two joint obligors on a bond held to have such an interest in the life of the other. Branford *v.* Saunders, 25 Weekly Reporter, 650 (1877). But insurance for the benefit of a creditor was held forbidden by the charter of a benefit society. Van Bibber *v.* Van Bibber, 82 Ky. 347 (1884).

[1] In Guardian Mutual Co. *v.* Hogan, 80 Ill. 35, 44 (1875), it was declared insufficient. And in Herdon *v.* West, 3 Best & Smith, 579 (1863), the same was held of a mere agreement not to enforce payment of a debt, such agreement being void for want of consideration. But a moral obligation was held sufficient in Ferguson *v.* Mass. Mutual Co., 32 Hun, 306, 612 (1884), where the debtor had been discharged in bankruptcy prior to the issuing of the policy.

[2] Thus in Cammack *v.* Lewis, 15 Wall. 643 (1872), a debt of $70 was held so disproportionate to insurance for $3,000 that the contract was invalid. The same doctrine was applied or declared in Guardian

§ 64. Effect of cessation of interest before time of performance by insurer.—If the doctrine of insurable interest had any sound logical basis, the reason underlying it would make it necessary that such interest continue until the happening of the event on which performance by the insurer is conditioned. In other words, if it is really contrary to public policy that one person should have an expectation of a benefit conditioned on the happening of the death of another, and if the temptation to destroy the life of another in order to obtain such benefit, must be balanced or counteracted by the existence of an insurable interest, it logically follows that, with the cessation of the insurable interest of the beneficiary, the contract should become invalid, so far as his rights therein are concerned. But, wherever an insurable interest has been held necessary, it has, with a singular inconsistency, been universally held that, if such interest exist at the time the contract was made, it is not essential to the rights of the beneficiary, that such interest continue until the happening of the event on which performance by the insurer is conditioned. This doctrine has commonly been based on the ground that a contract of life insurance differs in its nature from a contract of insurance on property, it being laid down that the former is not a mere contract of indemnity, but a contract to pay on the happening of a certain condition. This statement, however, is unsatisfactory, as it entirely fails to meet the objection suggested above. Nevertheless, we must assume the existence of this doctrine as a

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Mutual Co. *v.* Hogan. 80 Ill. 35, 46 (1875); Mowry *v.* Home Co., 9 R. I. 346, 354 (1869). But in the following cases, although the doctrine was recognized, the amounts were held not so disproportionate as to invalidate the contract: Corson's Appeal, 113 Pa. St. 438, 448 (1886; insurance, $2,000; debt, $500 to $750); Amick *v.* Butler, 111 Ind. 578 (1887; insurance, $2,000; debt, $600); Rittler *v.* Smith, 70 Md. 261 (1889; insurance. $6,500; debt, $1,000).

settled one.[1] In accordance therewith, where the insurable interest is accompanied with family relationship, the relationship may have ceased,[2] and in case of a debt the debt may have been extinguished by payment[3] or by operation of law, as, for instance, the statute of limitations;[4] but nevertheless, the fact of the interest having existed at the time the contract was made, suffices to enable the person then having such interest to subsequently enforce the contract.

§ 65. Statutory restrictions as to who may be beneficiary.—The only common law restriction as to who may be beneficiary, appears to be that arising from the lack of insurable interest. But, particularly in case of mutual

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[1] Mutual Co. *v.* Allen, 138 Mass. 24, 36 (1884). See, by way of illustration, Law *v.* London Indisputable Co., 24 L. J. Ch. 196 (1855), and cases cited in notes below.

[2] Conn. Mutual Co. *v.* Schaefer, 94 U. S. 457 (1876; absolute divorce); McKee *v.* Phœnix Co., 28 Mo. 383 (1859; divorce; where, however, the continuing obligation of the husband to support the wife and children was relied on as showing the relation of debtor and creditor). As to effect of divorce for adultery of wife, see Goldsmith *v.* Union Mutual Co., 15 Abb. N. C. 409 (1885). In Goldsmith *v.* Union Mutual Co., 18 Abb. N. C. 325 (1886), the court reformed a policy taken out by a husband for his wife's benefit, so as to conform to the intention of the parties that she should have the insurance only in case of her being his wife at the time of his death, she having meanwhile been divorced from him for her adultery.

[3] Corson's Appeal, 113 Pa. St. 438 (1886); Rittler *v.* Smith, 70 Md. 261, 265 (1889); Ferguson *v.* Mass. Mutual Co., 32 Hun, 306, 311 (1884). So, under English statute, Dalby *v.* India and London Co., 15 C. B. 365 (1854). In Ferguson *v.* Mass. Mutual Co., the court distinguish Babcock *v.* Bonnell, 80 N. Y. 244 (1880), as a case of a policy delivered as collateral security for a debt. As to amount of recovery see § 125.

Whether *as between the parties* the creditor's interest ceases on extinguishment of the debt, depends on whether the agreement was to that, effect. See § 128.

[4] Rawls *v.* American Mutual Co., 27 N. Y. 282, 289 (1863); Mowry *v.* Home Co., 9 R. I. 346, 353 (1869).

benefit societies, such restrictions have frequently been imposed by statute.[1] It follows that in such case no person outside of the prescribed classes is capable of becoming a beneficiary.[2] Nor does the fact that a person is falsely described as belonging to such class create any right

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[1] A statute enlarging the classes of persons capable of being designated, held to apply without formal adoption by the society. Mass. Foresters v. Callahan, 146 Mass. 391 (1888); Marsh v. American Legion of Honor, 149 Mass. 512 (1889). See, however, American Legion of Honor v. Perry, 140 Mass. 580, 592 (1886); Britton v. Royal Arcanum, 46 N. J. Eq. 102, 107 (1889).

[2] Daniels v. Pratt, 143 Mass. 216, 221 (1887); Rindge v. New England Mutual Co., 146 Mass. 286 (1888); American Legion of Honor v. Smith 45 N. J. Eq. 466, 470 (1889); Britton v. Royal Arcanum, 46 N. J. Eq. 102, 105 (1889); Supreme Lodge Knights of Honor v. Nairn, 60 Mich. 44, 50 (1886); Michigan Mutual Assoc. v. Rolfe, 76 Mich. 146. 151 (1889); Palmer v. Welch, 23 Northeastern Rep. 412 (Supm. Ct. Ill. 1890); Kentucky Masonic Mutual Co. v. Miller, 13 Bush (Ky.), 489 (1877); Duvall v. Goodson, 79 Ky. 224 (1880); Basye v. Adams, 81 Ky. 368, 374 (1883); Keener v. Grand Lodge A. O. U. W., 38 Mo. App. 543. 549 (1889); Boasberg v. Cronan, 9 N. Y. Suppl. 664 (1890). See Supreme Council American Legion of Honor v. Green, 71 Md. 263 (1889); Folmer's Appeal, 87 Pa. St. 133 (1878); American Legion of Honor v. Perry, 140 Mass. 580, 589 (1886); *Re* Phillips' Insurance, 23 L. R. Ch. D. 235 (1883). So in case of by-law having force of statute. See Sanger v. Rothschild, 123 N. Y. 577 (1890). See as to limitation as to age of beneficiary in benefit society under Michigan statute, Smith v. Pinch, 80 Mich. 332 (1890).

It has indeed been held that a benefit society was estopped to set up its want of authority to insure for the benefit of one not expressly authorized or ***prohibited*** by the statute specifying the classes of beneficiaries. Bloomington Mutual Assoc. v. Blue, 120 Ill. 121, 128 (1887). But see Rockhold v. Canton Masonic Benev. Assoc., 129 Ill. 440, 464 (1889); Keener v. Grand Lodge A. O. U. W., 38 Mo. App. 543, 551 (1889). And held that the objection that the beneficiary did not belong to any of the classes prescribed, could not be raised by the administrator of the member, such administrator not himself belonging to any of such classes. McFarland v. Creath, 35 Mo. App. 112, 124 (1889). Not even on the ground of fraudulent conspiracy between the member and the association. Id.

in him as beneficiary.[1] But the contract is not necessarily invalidated by a designation of a person prohibited by statute to be a beneficiary;[2] in such case, the contract may be enforced as if no designation had been made at all.[3] Of course the statute applicable must be considered, to determine whether any given person is capable of becoming a beneficiary. It may be added that, in furtherance of the general objects of insurance, the tendency is to make these provisions as inclusive as possible, consistently with other principles of law.[4]

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[1] Supreme Council American Legion of Honor *v.* Green, 71 Md. 263 (1889), where one falsely described as "niece" was not allowed to recover on the contract.

[2] Keener *v.* Grand Lodge A. O. U. W., 38 Mo. App. 543 (1889); Schonfield *v.* Turner, 75 Tex. 324 (1889). But where payment is made conditional on the designation of some person, the insurer is not liable in the absence of designation. Order of Mutual Companions *v.* Griest, 76 Cal. 494 (1888). Otherwise where payment is not so made conditional. Whitehurst *v.* Whitehurst, 83 Va. 153 (1887). The insurer was allowed to waive the validity of a designation, against the objection of other beneficiaries in the same certificate. Knights of Honor *v.* Watson, 64 N. H. 517 (1888). So in case of designation of "heirs," where a portion of such heirs were, by the constitution of the insuring society, disqualified, held that such disqualification was waived by the insurer paying the money into court. Johnson *v.* Supreme Lodge Knights of Honor, 13 Southwestern Rep. 794 (Supm. Ct. Ark. 1890).

[3] Thus recovery was allowed as if no designation had been made, in Rindge *v.* New England Mutual Co., 146 Mass. 286 (1888); Britton *v.* Royal Arcanum, 46 N. J. Eq. 102, 109 (1889); Palmer *v.* Welch 23 Northeastern Rep. 412 (Supm. Ct. Ill. 1890). And the original designation was held to remain in force, in Elsey *v.* Odd Fellows' Mutual Relief Assoc., 142 Mass. 224 (1886); Supreme Lodge Knights of Honor *v.* Nairn, 60 Mich. 44, 55 (1886).

[4] A statement in the constitution of a benefit society that its object was to make "suitable provision for the *widow and the orphan*," held not to prevent a valid designation of the *mother* of the insured as beneficiary. Mass. Foresters *v.* Callahan, 146 Mass. 391 (1888). So held of a similar provision in the charter, where the *sister* of the insured was designated. Maneely *v.* Knights of Birmingham. 115 Pa. St. 305 (1886); Highland *v.* Highland, 109 Ill. 366 (1884). So where one not

§ 66. Mode of designation of beneficiary.—The methods that may be employed in a contract to designate the beneficiary are so infinitely numerous and varied, that it seems impracticable to lay down any general rule on the subject, other than that the mode of designation is not important, if the intent to designate a particular person can be clearly ascertained.[1]

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a member of his family was designated. Mitchell *v*. Grand Lodge Iowa Knights of Honor, 70 Iowa, 360 (1886; where, however, payment was to be made "as he may direct"). And, *a fortiori*, in case of such an enumeration of classes, one of such classes may be designated, to the exclusion of the others. Spry *v*. Williams, 47 Northwestern Rep. 890 (Supm. Ct. Iowa, 1891).

[1] Brooklyn Co. *v*. Bledsoe, 52 Ala. 538, 547 (1875; designation of "children" held sufficiently definite); Scott *v*. Dickson, 108 Pa. St. 6 (1884; where an instrument invalid as an assignment, for want of delivery, was held to operate as a valid designation).

As to what constitutes designation by will, see Highland *v*. Highland, 109 Ill. 366 (1884). Designation by will of beneficiary in benefit certificate held insufficient. Mellows *v*. Mellows, 61 N. H. 137 (1881).

As to designation of member of benefit society, who himself effects the insurance, see Harding *v*. Littledale, 150 Mass. 100 (1889).

In Mellows *v*. Mellows, 61 N. H. 137 (1881), compliance with requirement that designation be acknowledged, was held essential.

The word "dependent" was held not to include a creditor. Skillings *v*. Mass. Benefit Assoc., 146 Mass. 217 (1888); or a woman engaged to marry the insured. American Legion of Honor *v*. Perry, 140 Mass. 580, 590 (1886); Palmer *v*. Welch, 23 Northeastern Rep. 412 (Supm. Ct. Ill. 1890).

The word "family" held to include young woman, not related to insured, but who lived for many years in same household. Carmichael *v*. Northwestern Mutual Assoc., 51 Mich. 494 (1883). So niece in whose household he lived. Folmer's Appeal, 87 Pa. St. 133 (1878). But not one who was his army comrade and intimate friend, had lived at his house several years, had become physically disabled and dependent on others for support. Supreme Lodge Knights of Honor *v*. Nairn, 60 Mich. 44 (1886). Or mother of insured, who was not living with him, but with her husband in another town and county. Elsey *v*. Odd Fellows' Mutual Relief Assoc. 142 Mass. 224 (1886). Or

§ 67. The same; heirs and personal representatives.— As has been noted, in the absence of any designation of a

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brother of insured not dependent upon him. American Legion of Honor *v.* Smith, 45 N. J. Eq. 466, 471 (1889).

"Related to" held to include only relations by blood, and not connections by marriage. Supreme Council Chosen Friends *v.* Bennett, 19 Atlantic Rep. 785 (Ct. of Ch. of N. J. 1890).

As to effect of false statement of relationship of beneficiary to insured, see Britton *v.* Royal Arcanum, 46 N. J. Eq. 102, 105 (1889); Vivar *v.* Supreme Lodge Knights of Pythias, 20 Atlantic Rep. (Supm. Ct. N. J. 1890).

"Estate" held, under circumstances, to refer to infant child of insured. Pace *v.* Pace, 19 Fla. 438, 453 (1882); also held to designate personal representative. Basye *v.* Adams, 81 Ky. 368, 377 (1883). Compare Daniels *v.* Pratt, 143 Mass. 216 (1887).

Under provision for payment to "legal heirs or beneficiary" of member of benefit society, an assignee for value of the certificate held not entitled as "beneficiary." Basye *v.* Adams, 81 Ky. 368, 373 (1883).

Where the beneficiaries were mentioned disjunctively, they were held not all entitled, but only the first named. Masonic Mutual Relief Assoc. *v.* McAuley, 2 Mackey (D. C.), 70 (1882).

As to evidence in action on policy wherein beneficiary is not designated, see Norristown Title Co. *v.* Hancock Co., 132 Pa. St. 385 (1890).

See also, as to designation, Foley *v.* McMahon, 73 Ill. 66 (1874).

By statute in England the names of the persons interested in a life policy must be inserted therein. See Evans *v.* Bignold, 4 L. R. Q. B. 622 (1869); Hodson *v.* Observer Co., 8 El. & Bl. 40 (1857); Dowker *v.* Canada Co., 24 Upper Canada, Q. B. 591 (1865).

See, as to designation under by laws of benefit society, Ireland *v.* Ireland, 42 Hun, 212 (1886); Day *v.* Case, 43 Hun, 179 (1887); Bishop *v.* Empire Order, 43 Hun, 472 (1887); Kepler *v.* Supreme Lodge Knights of Honor, 45 Hun, 274 (1887); Brooklyn Masonic Relief Assoc. *v.* Hanson, 53 Hun, 149 (1889); Folmer's Appeal, 87 Pa St. 133 (1878); Williams' Appeal, 92 Pa. St. 69 (1879); Arthur *v.* Odd Fellows' Benev. Assoc., 29 Ohio St. 557 (1876); State *v.* Standard Life Assoc., 38 Ohio St. 281 (1882); State *v.* People's Mutual Benefit Assoc., 42 Ohio St. 579 (1885); National Mutual Aid Assoc. *v.* Gonser, 43 Ohio St. 1 (1885); Mutual Benefit Assoc. of Michigan *v.* Hoyt, 46 Mich 473 (1881); Michigan Mutual Benefit Assoc. *v.* Rolfe, 76 Mich.

beneficiary, the personal representatives, *i. e.*, the executors or administrators, are the beneficiaries, or rather are trustees for the real beneficiaries. But sometimes the personal representatives are expressly designated as beneficiaries, as, for instance, by the term "legal representatives," for this term, as used in an insurance contract, refers ordinarily to executors and administrators,[1] though it will be otherwise construed, where it is manifest that another disposition was intended.[2] So the term "heirs," when uncontrolled by the context, simply indicates the

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146 (188[?]); Ballou *v.* Gile, 50 Wis. 614 (1880); Fenn *v.* Lewis, 10 Mo. App. 478; 81 Mo. 259 (1883); Roberts *v.* Roberts, 64 N. C. 695 (1870); Fletcher *v.* Collier, 61 Ga. 653 (1878); Tyler *v.* Odd Fellows' Assoc., 145 Mass. 134 (1887); Jewell *v.* Grand Lodge A. O. U. W., 41 Minn. 405 (1889); Van Bibber *v.* Van Bibber, 82 Ky. 347 (1884); Ashby *v.* Costin, 21 L. R. Q. B D. 401 (1888).

[1] Griswold *v.* Sawyer, 26 Northeastern Rep. 464 (Ct. of App. of N. Y. 1891); People *v.* Phelps, 78 Ill. 147 (1875); Johnson *v.* Van Epps, 110 Ill. 551, 560 (1884); Kelley *v.* Mann, 56 Iowa, 625 (1881); Armstrong *v.* Mutual Co., 11 Fed. Rep. 573 (1882). But the term as used in connection with a designation of the beneficiaries, was interpreted as referring to them. Masonic Mutual Relief Assoc. *v.* McAuley, 2 Mackey (D. C.), 70 (1882). And even to assignees of the contract. N. Y. Co. *v.* Armstrong, 117 U. S. 591, 597 (1886). And in Griswold *v.* Sawyer, above, in view of the subject matter and the surrounding circumstances, the term was applied to the widow and children of the insured, they being dependent upon him for support, and he being, at the time of making the contract, aged and heavily indebted.

"Representatives" held to include any person that the insured might designate, or, if he made no designation, the person whom the by-laws of the insuring society designated. Walter *v.* Hensel, 42 Minn. 204 (1889).

Administrators held entitled under designation of "heirs or representatives." Wason *v.* Colburn, 99 Mass. 342 (1868); but the heir, who was also the only child of the insured, held entitled in Loos *v.* John Hancock Mutual Co., 41 Mo. 538 (1867). The administrator held entitled under designation of "heirs, executors, administrators or assigns." Rawson *v.* Jones, 52 Ga. 458 (1874).

[2] See cases cited in note 1, above.

persons designated by the statute as such in case of intestacy.[1]

§ 68. **The same; "children."**—In accordance with the general rule that the mode of designation is not important, if the intent to designate a particular person can be

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[1] Gosling *v.* Caldwell, 1 Lea (Tenn.), 154 (1878); Lawwill *v.* Lawwill, 29 Ill. App. 643 (1889); Mullins *v.* Thompson, 51 Tex. 7 (1879); Johnson *v.* Supreme Lodge Knights of Honor, 13 Southwestern Rep. 794 (Supm. Ct. Ark. 1890); Weisert *v.* Muehl, 81 Ky. 336, 339 (1883); La mont *v.* Grand Lodge Legion of Honor, 31 Fed. Rep. 177 (1887). "Heirs" held entitled to share equally. Wilburn *v.* Wilburn, 83 Ind. 55 (1882). "Heirs," as used in a by-law of benefit society, held to designate such persons as would be the legal heirs or distributees of the member at the time of his application or designation. Elsey *v.* Odd Fellows' Relief Assoc., 142 Mass. 224 (1886). As to whether under designation as beneficiaries of "A and heirs," the heirs of A, or of the insurer, are intended, see Union Mutual Co. *v.* Stevens, 19 Fed. Rep. 671, 675 (1883). Under designation of "heirs," followed by designation of "wife or daughters," wife alone held entitled. Addison *v.* Commercial Travelers' Assoc., 144 Mass. 591 (1887). In case of a policy taken out by a wife on the life of her husband, the term "heirs of the insured" held to give their children an interest as *her* heirs and not merely as *his*. Whitehead *v.* N. Y. Co., 33 Hun, 425, 429 (1884). Under a statute limiting payment by a benefit society to the families or heirs *of any member*, a contract for payment to "L (his wife), *heirs, administrators or assigns*," held to designate *his*, not *her*, heirs, &c. Michigan Mutual Benefit Assoc. *v.* Rolfe, 76 Mich. 146 (1889). See also, as to meaning of "heirs," Hellenberg *v.* District No. 1 of B'nai Berith, 94 N. Y. 580 (1884); Covenant Mutual Co. *v.* Sears, 114 Ill. 108 (1885; "devisees," "heirs"). As to "heirs at law," see Alexander *v.* Northwestern Masonic Aid Assoc., 126 Ill. 558 (1888). "Legal heirs" held not to include widow. Phillips *v.* Carpenter, 79 Iowa, 600 (1890); Gauch *v.* St. Louis Mutual Co., 88 Ill. 251 (1878). That "legal heirs" may include dependents, as well as next of kin, see Britton *v.* Royal Arcanum, 46 N. J. Eq. 102, 111 (1889). And held to include widow. Kaiser *v.* Kaiser, 13 Daly, 522 (1886). So "lawful heirs." Hannigan *v.* Ingraham, 55 Hun, 257 (1889).

"Devisee," as used in benefit certificate, held to mean one *designated* by the member as beneficiary. Lamont *v.* Grand Lodge Iowa Legion of Honor, 31 Fed. Rep. 177 (1887).

clearly ascertained, the word "children," used as a term of designation, is not always strictly limited to those ordinarily included in the term.[1]

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[1] That the designation of "children" is not void for uncertainty, see Brooklyn Co. *v.* Bledsoe, 52 Ala. 538, 547 (1875). "Children" held to include children born after the making of the contract. Thomas *v.* Leake, 67 Tex. 469 (1887). Otherwise where such "children" were specifically named. Spry *v.* Williams, 47 Northwestern Rep. 890 (Supm. Ct. Iowa, 1891). Adopted child held entitled as "child." Martin *v.* Ætna Co., 73 Me. 25 (1881); but grandchild held not. Winsor *v.* Odd Fellows' Beneficial Assoc., 13 R. I. 149 (1880); Continental Co. *v.* Webb, 54 Ala. 688, 700 (1875); Russell *v.* Russell, 64 Ala. 500 (1879). Otherwise in Duvall *v.* Goodson, 79 Ky. 224 (1880). "Orphan children" held not to include *adult* children. Hammerstein *v.* Parsons, 29 Mo. App. 509 (1888).

Under provision for payment to "wife and *their* children" (*i. e.* of wife and insured), child by *former* wife, held, under circumstances, included. Stegler *v.* Stegler, 77 Va. 163, 168 (1883). So of designation of "wife and children." McDermott *v.* Centennial Mutual Assoc., 24 Mo. App. 73 (1887). But "their children" held to include only the children *common* to them. Evans *v.* Opperman, 76 Tex. 293, 301 (1890). So in case of contract for "the sole use of" the wife and children of insured, the amount to be paid to "their children" in case of her death in his lifetime, held that his children by a second marriage were not entitled. Lockwood *v.* Bishop, 51 How. Pr. 221, 223 (1876). Here the court distinguish Greenfield *v.* Mass. Mutual Co. (Bliss on Life Ins. 2d ed. p. 572), as a case where there were no children of the joint bodies of the insured and wife, but each had at the time of making the contract children by former marriages, and the husband an illegitimate child.

"Wife and children" held entitled to share equally. Cragin *v.* Cragin. 66 Me. 517 (1876); Felix *v.* Grand Lodge A. O. U. W., 31 Kans. 81 (1883); Seyton *v.* Satterthwaite, 34 L. R. Ch. D. 511 (1887); Jackman *v.* Nelson, 147 Mass. 300 (1888); Conn. Mutual Co. *v.* Baldwin, 15 R. I. 106 (1885).

Provision making the amount of the insurance payable to the children of the insured, held to enure to the benefit of the children of a child that died before the condition took effect. Hull *v.* Hull, 62 How. Pr. 100 (1881).

For construction of provision for payment to children of original beneficiary, where some of them die before insured, see U. S. Trust Co.

§ 69. **The same; "wife,"[1] "widow."[2]—**

§ 70. **The rights of the beneficiary as affected by acts and declarations of the insured.**—As bearing on the question of the truth of the statements made by the insured and contained in the contract, or on the question of the performance by him of the conditions in the contract, his

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v. Mutual Benefit Co., 115 N. Y. 152 (1889); Continental Co. *v.* Palmer, 42 Conn. 60 (1875). Compare Schneider *v.* Northwestern Mutual Co., 33 Mo. App. 64 (1888). And where some of them die before the trial of an action on the contract, Covenant Mutual Assoc. *v.* Hoffman, 110 Ill. 603 (1884).

[1] A designation by a member of a benefit society, held sufficient. notwithstanding the addition of the word "wife" to the name of the person designated, she not being his wife. Durian *v.* Central Verein, 7 Daly, 168, 173 (1877); Story *v.* Williamsburgh Masonic Assoc., 95 N. Y. 474 (1884). But see Schnook *v.* Order Sons of Benjamin, 53 N. Y. Super. Ct 131 (1886), holding that it must be clearly shown that such designation was made and became part of the contract. Compare Keener *v.* Grand Lodge A. O. U. W., 38 Mo. App. 543, 551 (1889); Supreme Council American Legion of Honor *v.* Green, 71 Md. 263. 269 (1889). In Keener *v.* Grand Lodge A. O. U. W., 38 Mo. App. 543, 550 (1889), a concubine was held included under neither designation of "dependents" nor that of "family." Wife divorced (for her own fault) held not entitled as "heir" or "member of the family" of the insured. Tyler *v.* Odd Fellows' Assoc., 145 Mass. 134 (1887). But wife divorced *a mensa et thoro*, held entitled as "widow." American Legion of Honor *v.* Smith, 45 N. J. Eq. 466 (1889). As to effect of absolute divorce, see Heyman *v.* Meyerhoff, 16 W. N. C. (Pa). 212 (1884).

[2] See note 1. "Widow" held to apply to *legal* widow, not to woman with whom insured went through forms of marriage and cohabited during many of the latter years of his life. Bolton *v.* Bolton, 73 Me. 299 (1882); Grand Lodge Order of Herman-Soehne *v.* Yettel, 26 Mo. App. 108 (1887; "widow;" "dependents"). Compare Berlin Beneficial Soc *v.* March, 82 Pa. St. 166 (1876). Under provision of by-law of benefit society that the amount should be paid to the "widow or designated heirs" of insured, his second wife held entitled as against the representatives of his first wife who had been desigated in the certificate as beneficiary, though such designation had not been changed. Riley *v.* Riley, 75 Wis. 464 (1890).

declarations, as well as his acts, are, under the general rules of evidence, clearly admissible against him.[1] A different rule applies to the effect of such acts and declarations as against the beneficiary, when another than the insured. So far, indeed, as the statements of the insured are contained in the contract, or so far as the acts of the insured are in violation of the contract, the beneficiary is very properly held bound by such statements and acts.[2] But, on the other hand, the statements made by the insured, and not contained in the contract, are, so far as the rights of the beneficiary are concerned, those of a stranger to the contract;[3] hence the beneficiary is not prejudiced by them.[4] Nor does the fact that the person whose statements are sought to be proved, is dead, make the evidence admissible.[5] And even more obviously true is it, that acts

[1] Grattan *v.* Metropolitan Co., 92 N. Y. 274, 285 (1883). So as against his personal representative. Id.

[2] Maynard *v.* Rhodes, 5 Dowling & Ryland, 266 (1874).

[3] See as to declarations of stranger to contract, Continental Co. *v.* Delpeuch, 82 Pa. St. 225 (1876).

[4] Thus of declarations made by the insured subsequently to the making of the contract. Fitch *v.* American Popular Co., 59 N. Y. 557, 573 (1875); Butler *v.* State Mutual Co., 55 Hun, 296, 301 (1890); Fraternal Mutual Co. *v.* Applegate, 7 Ohio St. 293 (1857); Supreme Lodge Knights of Pythias *v.* Schmidt, 98 Ind. 374 (1884; mutual benefit); Penn Mutual Co. *v.* Wiler, 100 Ind. 92, 103 (1885); Kline *v.* National Benefit Assoc., 111 Ind. 462 (1887); McDermott *v.* Centennial Mutual Assoc., 24 Mo. App. 73 (1887); Grand Lodge Order of Hermann-Soehne, 26 Mo. App. 108 (1887); Grangers' Co. *v.* Brown, 57 Miss. 308 (1879); Valley Mutual Assoc. *v.* Teewalt, 79 Va. 421 (1884); Caffery *v.* John Hancock Co., 27 Fed. Rep. 25 (1886); Lazensky *v.* Supreme Lodge Knights of Honor, 31 Fed. Rep. 592 (1887); Southern Co. *v.* Booker, 9 Heisk. (Tenn.), 606, 618 (1872). See Evers *v.* Life Assoc. of America, 59 Mo. 429 (1875). Thus in Rawls *v.* American Mutual Co., 27 N. Y. 282, 290 (1863), statements by the insured concerning his in temperate habits, were held properly excluded.

[5] Mulliner *v.* Guardian Mutual Co., 1 T. & C. (N. Y.), 448 (1873); Fraternal Mutual Co. *v.* Applegate, 7 Ohio St. 293 (1857). See Macaulay *v.* Central National Bank, 27 So. Car. 215 (1887). But testi-

of the insured that are not in violation of the contract, are not prejudicial to the rights of the beneficiary. It is not obvious how the application of these rules is affected by the fact that by the contract the right is reserved to the insured to divest the rights of the beneficiary.[1] But their application is subject to an apparent modification in the case of statements of the insured that are, strictly speaking, prior or subsequent to the contract, but yet are so closely connected with the subject matter of the contract as to be regarded as in effect statements contained in the contract.[2]

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mony concerning an interview with the insured subsequently to the making of the contract, was held properly admitted as expert testimony. Mulliner *v.* Guardian Mutual Co., 1 T. & C. (N. Y.), 448 (1873). And where the facts are otherwise proved, the declarations are competent to show that the insured had knowledge of such facts. Dilleber *v.* Home Co., 69 N. Y. 256, 260 (1877).

[1] Thus where such right was reserved in a benefit certificate, yet the declarations were held inadmissible. Supreme Lodge Knights of Pythias *v.* Schmidt, 98 Ind. 374, 379 (1884). This seems irreconcilable with Smith *v* National Benefit Society, 51 Hun, 575 (1889); affirmed in 123 N. Y. 85 (1890), though there the reservation was contained in a statute.

[2] Thus the declarations of the insured made as to his state of health, and at a time prior to and not remote from his examination by the medical examiner of the insurer, and *in connection with facts or acts exhibiting his state of health*, held admissible in evidence against the holder of the policy. Swift *v.* Mass. Mutual Co., 63 N. Y. 186 (1875), holding it error in action on policy to refuse to allow the insurer to prove statements made by the insured to different persons prior to the insurance, as to his own health and as to the cause of ailments he had and showed at the time of making those statements. So where the declarations were made shortly *after* such examination, the insured being at the time of such declarations sick in bed. Aveson *v.* Kinnaird, 6 East, 188 (1805). In Valley Mutual Co. *v.* Burke, 7 Va. L. J. 173, 178 (Supm. Ct. Va. 1882), such declarations were held properly admitted, though it does not appear whether they were prior or subsequent to the contract. Otherwise, however, where no *acts* of the insured are offered in evidence, but *mere declarations* alone, without any fact establishing his condition of health or constituting a part of the *res gestæ*. Edington *v.* Mutual Co., 67 N.

§ 71. **Assignment of interest in contract.**—From the general principle that a contract of insurance is governed by the rules applicable to contracts generally, it results that the general rules applicable to the assignment of contracts apply to the assignment of contracts of insurance, leaving out of consideration, for the present, the application of the doctrine of insurable interest. Hence, in determining the assignability of a given contract of insurance, it is necessary to determine the general rules applicable to the assignment of contracts, as such rules exist in the jurisdiction the law of which is to be applied.[1] The general rules

Y. 185, 193 (1876); Terwilliger *v.* Supreme Council Royal Arcanum, 49 Hun, 305 (1888); Union Central Co. *v.* Cheever, 36 Ohio St. 201 (1880); Valley Mutual Co. *v.* Burke, 7 Va. L. J. 173 (Supm. Ct. Va. 1882); Valley Mutual Assoc. *v.* Teewalt, 79 Va. 421 (1884); Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 648 (1885); Reid *v.* Piedmont & Arlington Co., 58 Mo. 421, 425 (1874). See Doty *v.* N. Y. State Mutual Benefit Assoc., 9 N. Y. Suppl. 42 (1890). Where the defense was suicide, declarations of the insured, constituting part of the *res gestæ*, were held properly admitted. Smith *v.* National Benefit Soc., 123 N. Y. 85 (1890).

[1] See Hutson *v.* Merrifield, 51 Ind 24, 29 (1875). See as to law of place, § 5. In stating the following illustrations of the rules governing the assignability of contracts of insurance, it is to be borne in mind that the rule applied in a particular case may sometimes be merely an application of a rule applicable to contracts generally, but peculiar to the jurisdiction in question.

A policy held assignable by delivery merely, without writing. Marcus *v.* St. Louis Mutual Co., 68 N. Y. 625 (1877); Madeira's Estate, 16 Phila. (Pa.), 399 (1884), which see as to what is evidence of completion of gift of policy. Compare Pence *v.* Makepeace, 65 Ind. 345, 361 (1879).

A policy held to be the subject of a *donatio mortis causa.* Witt *v.* Amis, 1 Best & Smith, 109 (1861). See also, as to gift of policy, Ireland *v.* Ireland, 42 Hun, 212 (1886).

A policy held assignable as a "chose in action" under a statute. Scobey *v.* Waters, 10 Lea (Tenn.), 551, 561 (1882); Bushnell *v.* Bushnell, 92 Ind. 503 (1883); N. Y. Co. *v.* Flack, 3 Md. 341, 354 (1852); Souder *v.* Home Friendly Soc., 20 Atlantic Rep. 137 (Ct. of App. of Md.

applicable to the assignment of contracts are beyond the scope of our present subject, but it may be said that, where

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1890). So held assignable as a "thing in action." *Ex parte* Ibbetson, 8 L. R. Ch. D. 519 (1878). See Howes *v.* Prudential Co., 49 L. T. R. 133 (1883).

An assignment by a married woman was held invalid, under the rules governing her general disability to contract. Godfrey *v.* Wilson, 70 Ind. 50, 57 (1880). And an assignment by a married woman held valid under such general rules. Damron *v.* Penn Mutual Co., 99 Ind. 478, 484 (1884); Pomeroy *v.* Manhattan Co., 40 Ill. 398 (1866); Collins *v.* Dawley, 4 Colo. 138 (1878); Scobey *v.* Waters, 10 Lea (Tenn.), 551 (1882).

Indorsement in blank held to operate by way of estoppel. Plummer *v.* Peoples' Nat. Bank, 65 Iowa, 405 (1884); Conn. Mutual Co. *v.* Westervelt, 52 Conn. 586 (1879); Norwood *v.* Guerdon, 60 Ill. 257 (1871). See Whitridge *v.* Barry, 42 Md. 140 (1874).

Specific performance of an agreement to assign a life policy, decreed, and the right to have it assigned free from incumbrances, declared. Gatayes *v.* Flather, 34 Beavan, 387 (1865). But see Potter *v.* Spilman, 117 Mass. 322 (1875).

An assignment avoided as having been obtained by fraud. Jones *v.* Keene, 2 Moody & R. 348 (1841); Mutual Benefit Co. *v.* Wayne County Bank, 68 Mich. 116 (1888). Compare Barber *v.* Morris, 1 Moody & R. 62 (1831). As to sufficiency of evidence of fraud to enable contract for sale of policy to be rescinded, see Thompson *v.* Lambert, 2 Irish Rep. (Equity), 433 (1868). In an action on a policy already paid by the insurer to an assignee, on the faith of an assignment and receipt indorsed therein at the time, the burden was held on the plaintiff to rebut the *prima facie* defense, by showing the assignment to have been fraudulently obtained, and that before payment the insurer had notice. Northwestern Mutual Co. *v.* Roth, 118 Pa. St. 329 (1888). See also, Home Mutual Co. *v.* Seager (§ 121, note).

As to effect of exception in favor of assignee for value, from provision for forfeiture for suicide. City Bank *v.* Sovereign Co., 50 L. T. R. 565 (1884).

An assignee of a contract fraudulent and void in its inception, such assignee being a party to the fraud, held not entitled to recover back from the assignor the consideration paid for the assignment. Blattenberger *v.* Holman, 103 Pa. St. 555 (1883). Compare as to reimbursement for premiums paid, Conn. Mutual Co. *v.* Burroughs (§ 84, note).

An assignment of a policy held a sufficient consideration to take a

the distinction between legal and equitable remedies is preserved, a contract is not assignable at law, in the absence of statutory provision to the contrary. But the doctrine of the non-assignability of contracts at law has been extensively modified by statute.[1] For the present, we leave out of consideration, cases where an assignment is sought to be made, conflicting with the rights of the beneficiary, and, for the sake of simplicity, assume that the assignor is, at the time of the assignment, the beneficiary as well as the insured, or that the assignment is made with

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contract out of the statute of frauds. Leake *v.* Ball, 116 Ind. 214 (1888).

As to effect of covenant by assignor to do nothing whereby the contract should be forfeited, see Hawkins *v.* Coulthurst, 5 Best & Smith, 343 (1864). See generally, as to sufficiency of proof of assignment, Roberts *v.* Phœnix Mutual Co., 120 U. S. 86 (1887); Trough's Estate, 75 Pa. St. 115 (1874); Scott *v.* Dickson. 108 Pa. St. 6 (1884); Pence *v.* Makepeace, 65 Ind. 345 (1879); Swift *v.* Railway Passenger Co., 96 Ill. 309 (1880); Harrison *v.* McConkey, 1 Md. Ch. 34 (1847); Whitridge *v.* Barry, 42 Md. 140 (1874); Matter of King, 14 L. R. Ch. D. 179 (1879); Johnson *v.* Swire, 3 Giffard, 194 (1861); Jones *v.* Consolidated Investment Co., 26 Beavan, 256 (1858); Chowne *v.* Baylis, 31 Beavan, 351 (1862); Matter of Hickey, 10 Irish Rep. (Equity), 117 (1875); Hayes *v.* Alliance British Co., 8 L. R. (Irish), 149 (1881). As to sufficiency of re-assignment, see Alabama Gold Co. *v.* Garmany, 74 Ga. 51, 55 (1884). Directions on back of policy that the amount of the insurance should be distributed among certain beneficiaries named, held not assignment. St. Clair Co. Benev. Assoc. *v.* Fietsam, 97 Ill. 474, 480 (1881).

[1] Thus in England a policy is by statute *assignable at law*. See Matter of Turcan, 40 L. R. Ch. D. 5 (1888); Newman *v.* Newman, 28 L. R. Ch. D. 674 (1883); Webster *v.* British Empire Mutual Co., 15 L. R. Ch. D. 169 (1880); Spencer *v.* Clarke, 9 L. R. Ch. D. 137 (1877); Crossley *v.* City of Glasgow Co., 4 L. R. Ch. D. 421 (1876); British Equitable Co. *v.* Great Western Co., 38 L. J. Ch. 132 (1868); West of England Bank *v.* Batchelor, 51 L. J. Ch. 199 (1882). The words "legally assigned," as used in a policy, held to mean *validly and effectually assigned*, and not merely "*legally*," as distinguished from "*equitably*" *assigned.* Dufaur *v.* Professional Co., 25 Beavan, 599 (1858).

the assent of the beneficiary. But, whatever be the rights of the beneficiary, it is clear that, as in case of contracts generally, an assignment by the insured is ineffectual if the consent of the insurer be withheld.[1] And the burden of proving even a *prima facie* valid assignment, is on the person claiming under the assignment.[2]

§ 72. **The same; as security.**—The policy, or other instrument evidencing the contract of insurance, being a mere chose in action, is undoubtedly subject to the general rules applied to the transfer of choses in action by way of mortgage or pledge, or otherwise as security.[3]

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[1] Hubbard *v.* Stapp, 32 Ill. App. 541 (1889). As to necessity for compliance with requirement for assent of insurer to assignment, see National Mutual Aid Soc. *v.* Lupold, 101 Pa. St. 111 (1882); Mutual Protection Co. *v.* Hamilton, 5 Sneed (Tenn.), 269 (1857); N. Y. Co. *v.* Flack, 3 Md. 341, 353 (1852); Risley's Succession, 11 Rob. (La.), 298 (1845); Harman *v.* Lewis, 24 Fed. Rep. 97 (1885); Mutual Co. *v.* Watson, 30 Fed. Rep. 653, 658 (1887). But notice to the insurer of the assignment, is not essential to its validity, unless required by the contract. Hirschl *v.* Clark, 47 Northwestern Rep. 78 (Supm. Ct. Iowa, 1890). Verbal notice to insurer of the assignment, held sufficient to give priority over subsequent assignees. North British Co. *v.* Hallett, 7 Jur. N. S. 1263 (1861). A policy contained a clause declaring that it could be assigned only on the written approval of the insurer; it did not declare that a violation of the provision would avoid the policy. Held, in an action on the policy, that a violation of this provision did not involve a forfeiture, and that an assignee of the policy could enforce it, though the insurer had not consented to the assignment. Marcus *v.* St. Louis Mutual Co., 68 N. Y. 625 (1877). The assent of the insurer to an assignment of the contract does not make a new contract. Mutual Co. *v.* Allen, 138 Mass. 24, 28 (1884).

[2] Henry *v.* Grand Lodge I. O. M. A., 15 Bradw. (Ill.), 151 (1884; benefit certificate).

[3] As to the disposition of the proceeds in such case, see § 128.

The following are given as illustrations of cases that involve the effect of such transfers, but, as intimated in the text. the principles applicable to any given case, must ordinarily be discovered by examining the law applicable generally to mortgages or pledges, and that is, of course, beyond the scope of our present subject.

§ 73. Validity of assignment as affected by absence of insurable interest in assignee.—We have already stated what we regard as sufficient reasons for condemning the doctrine of insurable interest, as based on no sound legal

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An assignment of a policy, absolute on its face, may be shown by parol to have been given simply as security. Matthews *v.* Sheehan, 69 N. Y. 585, 590 (1877). As to evidence as to whether assignment was absolute or as security, see Cunningham *v.* Smith, 70 Pa. St. 450 (1872); Cushman *v.* Family Fund Soc., 9 N. Y. Suppl. 272 (1890). See, also, as to assignment as security, Lake *v.* Brutton, 8 DeGex., M. & G. 440 (1856); Collins *v.* Dawley, 4 Colo. 138 (1878); Shackelford *v.* Mitchell, 10 N. Y. Suppl. 122 (1890). Policy assigned as security for simple contract debt, without agreement as to interest, held chargeable with interest as well as the original debt. *Re* Kerr, 38 L. J. Ch. 539 (1868). Assignment of policy by wife as security for husband's debt, held void under statute making void, contracts, etc., by her as surety, etc., for him. Stokell *v.* Kimball, 59 N. H. 13 (1879). An assignment of a policy as security for a debt, held a "mortgage" under a statute. Caldwell *v.* Dawson, 5 Exch. 1 (1850). The assignment by a member of a benefit society, of his certificate as collateral security for a debt, held invalid under the statute. Briggs *v.* Earl, 139 Mass. 473 (1885). See as to effect of assignment as security, under Georgia statute, Alabama Gold Co. *v.* Garmany, 74 Ga. 51 (1884); under Louisiana statute, Succession of Risley, 11 Rob. (La.), 298 (1845). The validity of an assignment of a policy, with a provision enabling the assignor to redeem it during his life, the transfer to be absolute in case of his death before redeeming, sustained. Edington *v.* Ætna Co., 13 Hun, 543, 546 (1878). Where a policy had been pledged as collateral security, but was afterward surrendered by collusion between the insured and the insurer, and a new one issued, the pledgee held to have the same lien on the new as on the original policy. Norwood *v.* Guerdon, 60 Ill. 253 (1871). For a peculiar case involving a conflict of interest between one receiving a policy as collateral security, and one subsequently taking by assignment a duplicate of the policy, see Le Feuvre *v.* Sullivan, 10 Moore P. C. C. 1 (1855). Somewhat similar is Neale *v.* Molineux, 2 Carrington & P. 672 (1847). As to effect of mortgage of policy, see King *v.* Van Vleck, 109 N. Y. 363 (1888); Ford *v.* Tynte, 41 L. J. Ch. 758 (1872); Heyman *v.* Dubois, 13 L. R. Eq. 158 (1871); Haselfoot's Estate, 13 L. R. Eq. 327 (1872); Carter *v.* Hubback, 24 Weekly Reporter, 354 (1876); Nesbitt *v.* Berridge, 4 DeGex, J. & S. 45 (1863); Drysdale *v.* Piggott, 8 DeGex, M. & G. 546 (1856).

principle. But, assuming the existence of such doctrine, it certainly should be consistently applied. If, then, it is contrary to public policy, that one person should have an expectation of a benefit conditioned on the happening of the death of another, it surely seems immaterial, whether the person having such expectation, derived it from a contract made by him directly with the insurer, or by transfer from the person who made such contract with the insurer. Hence (making the assumption stated above), it must be regarded as the true doctrine, that an assignment of the interest in a contract of insurance to one having no insurable interest in the life insured, is invalid as contrary to public policy.[1] And this is so, whether the assignment is made by the person insured, who is also the beneficiary, or by a beneficiary who is not also the person insured,[2] and

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[1] This is the doctrine laid down in Warnock *v.* Davis, 104 U. S. 775 (1881; a case of partial assignment); Franklin Co. *v.* Hazzard, 41 Ind. 116 (1872); Franklin Co. *v.* Sefton, 53 Ind. 380 (1876); Missouri Valley Co. *v.* Sturges, 18 Kans. 93 (1877); Price *v.* Supreme Lodge Knights of Honor, 68 Tex. 361 (1887); Schonfield *v.* Turner, 75 Tex. 324 (1889); Basye *v.* Adams, 81 Ky. 368 (1883; benefit society); Roller *v.* Moore, 10 Southeastern Rep. 241 (Supm. Ct. Va. 1889); Helmetag *v.* Miller, 76 Ala. 183 (1884); Michigan Mutual Benefit Assoc. *v.* Rolfe, 76 Mich. 146 (1889). This doctrine is supported by dicta in Stevens *v.* Warren, 101 Mass. 564 (1869), where, however, it was unnecessary to so decide, the contract itself providing that assignment without the assent of the insurer should be void. And these dicta are clearly overruled by Mutual Co. *v.* Allen (see note 3, p. 121). But an interest in a life policy may be disposed of *by will* to one without insurable interest. Stoelker *v.* Thornton, 88 Ala. 241, 247 (1889). As to effect of general assignment, including policies that are, and policies that are not, capable of being legally assigned, see Armstrong *v.* Mutual Co., 11 Fed. Rep. 573 (1882).

As to lien of assignee for consideration paid, and for premiums or assessments paid, see § 127. Compare § 85.

[2] Gilbert *v.* Moose, 104 Pa. St. 74 (1883), which seems to overrule *pro tanto* Cunningham *v.* Smith, 70 Pa. St. 450 (1872). And the beneficiaries, having assigned to one without insurable interest, were themselves held precluded from enforcing the contract. Missouri Valley

whether or not the assignment was made in good faith.[1] And the burden is on the assignee seeking to enforce the contract, to prove the existence of such interest.[2]

But the doctrine of the necessity of an insurable interest to support such assignment, has been so frequently dissented from, that it can scarcely be said to be sustained by the weight of authority.[3] The alleged ground of the contrary doctrine, that an assignment to one having no insurable interest, is valid, seems to be, that the contract of insurance, being governed by the rules applicable to con-

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Co. *v.* McCrum, 36 Kans. 146 (1887), where one claiming under a subsequent assignment, otherwise valid, was also held so precluded.

[1] Downey *v.* Hoffer, 110 Pa. St. 109 (1885).

[2] Alabama Gold Co. *v.* Mobile Mutual Co., 81 Ala. 329 (1886), which see as to effect of statute. If, however, the insurer waives the objection and pays the money, a mere volunteer or stranger cannot object. See § 127.

[3] The doctrine that an assignment of the interest in a contract of insurance, valid in its inception, is valid, though made to one having no interest in the life insured, was laid down in St. John *v.* American Mutual Co., 13 N. Y. 31, 39 (1855); Valton *v.* National Fund Co., 20 N. Y. 32, 38 (1859); Olmsted *v.* Keyes, 85 N. Y. 593, 599, 601 (1881); Mutual Co. *v.* Allen, 138 Mass. 24 (1884; where, however, insured joined in assignment); Eckel *v.* Renner, 41 Ohio St. 232 (1884); Martin *v.* Stubbings, 126 Ill. 387, 403 (1888; dictum); Fitzpatrick *v.* Hartford Co., 56 Conn. 116 (1888); Clark *v.* Allen, 11 R. I. 439 (1877); Murphy *v.* Red, 64 Miss. 614 (1887); Rittler *v.* Smith, 70 Md. 261 (1889); Souder *v.* Home Friendly Soc., 20 Atlantic Rep. 137 (Ct. of App. of Md. 1890); Ashley *v.* Ashley, 3 Simons, 149 (1829); Vezina *v.* N. Y. Co., 6 Canada Supm. Ct. 30 (1881; so held, though the assignee paid the first premium, on the payment of which the delivery of the policy was conditioned). And a benefit certificate was held so assignable, notwithstanding a by-law that no certificate should *issue* to one not having an insurable interest. McFarland *v.* Creath, 35 Mo. App. 112 (1889). In Bursinger *v.* Bank of Watertown, 67 Wis. 75 (1886), where there is a dictum supporting the doctrine, unsuccessful attempts are made to show, that most of the cases that seem to assert a contrary doctrine, do not do so in reality. See Mallory *v.* Travelers' Co., 47 N. Y. 52, 54 (1871); Mutual Protection Co. *v.* Hamilton, 5 Sneed (Tenn.), 269 (1857); N. Y. Co. *v.* Flack, 4 Md. 341, 354 (1852).

tracts generally, is therefore assignable like contracts generally, irrespective of the question of such interest.[1] But this statement is unsatisfactory, as it entirely ignores and fails to meet the objection stated above.

§ 74. **Assignment without consent of beneficiary.**—In discussing the rules applicable to the assignment of the interest in a contract of insurance, we have assumed it to be made by, or with the assent of, the beneficiary. But where, as frequently happens, the insured or other person making the contract, is a distinct person from the one named therein as entitled to the benefits of the insurance, that is, as beneficiary, the question arises, whether such beneficiary can be deprived of such interest without his assent, as, for instance, if the insured attempt, by a subsequent arrangement with the insurer, to have another beneficiary specified. In determining such question, it is desirable to bear in mind, that the original contract of insurance, in such case, is simply a contract between two persons for the benefit of a third, and the question before us then becomes, whether, in such case, the interest of the third person is so vested, that the parties to the contract cannot thereafter divest it without his consent. This general question is an important and fundamental one in the law of contracts generally, and has been variously answered in various jurisdictions.[2] It is not within

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[1] See Olmsted *v*. Keyes, above.

[2] In 1 Parsons on Contracts, 7th ed. p. 497, it is said: "In this country, the right of a third party to bring an action on a promise made to another for his benefit, seems to be somewhat more positively asserted (*i. e.* than in England), and we think it would be safe to consider this a prevailing rule with us; indeed it has been held, that such promise is to be deemed made to the third party, if adopted by him, though he was not cognizant of it when made." But, as we shall see hereafter, this does not, at common law, apply, where the contract is under seal. See § 121.

the scope of our present subject, to enter upon the discussion of this question at large, but, wherever the question arises in connection with a contract of insurance, it should first be determined what is the law of the jurisdiction in question, as to the rights of a third person in a contract made between two other persons for his benefit. And, whatever may be the rule in cases where a contract is made without qualification for the benefit of a third, it seems clear enough, that the parties to the contract may expressly provide therein for divesting his interest without his consent.[1] But, apart from such reservation of the right to change, as indicated in the contract, it seems that their intention to reserve such right may be indicated by circumstances, though not stated in the instrument evidencing the contract. Hence we may state, as the rule best calculated to harmonize the authorities, that the circumstances attending the execution of the contract of insurance are always open to inquiry, to determine whether the power to divest the interest of the beneficiary without his consent, is reserved, but, in the absence of any circumstances that might assist in such determination, the determination must be in accordance with whatever rule may prevail in the jurisdiction in question, as to the power to divest the rights of a person in a contract made between others for his benefit, and the prevailing rule on this subject seems to be, that his rights cannot be so divested.[2]

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[1] See § 75.

[2] "It is the general rule, that a policy and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named." Central Bank of Washington *v.* Hume, 128 U. S. 195, 206 (1888), where, on the ground of the interest in the contract being irrevocably beyond the control of the insured, it was likewise held beyond the control of his creditors.

But, while in many decisions the rule has been thus broadly laid down, in others it has been laid down hesitat-

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And the rule that an irrevocable trust is thus created, seems broadly laid down, irrespective of particular circumstances, in Packard *v.* Conn. Mutual Co., 9 Mo. App. 469, 478 (1881); Waltz *v.* Mutual Aid Soc., 5 Pa. Co. 208 (1879; where the beneficiary was son of the insured); Wilburn *v.* Wilburn, 83 Ind. 55 (1882; dictum); Penn Mutual Co. *v.* Wiler, 100 Ind. 92, 103 (1885); Holland *v.* Taylor, 111 Ind. 121, 125 (1887; dictum); Ricker *v* Charter Oak Co., 27 Minn. 193 (1880; where the beneficiaries were the wife and children of the insured, who retained possession of the policy and paid all the premiums; S. P., Allis *v.* Ware, 28 Minn. 166; 1881); Splawn *v.* Chew, 60 Tex. 532 (1883; dictum); Weisert *v.* Muehl, 81 Ky. 336 (1883; designation of *heirs* in certificate of benefit society, held to create such trust in their favor); Valley Mutual Co. *v.* Burke, 7 Va. L. J. 173 (Supm. Ct. Va. 1882); Fowler *v.* Butterly, 78 N. Y. 68 (1879; interest of wife in policy on husband's life, held irrevocable, independently of statute, and an assignment of her interest procured by him by undue influence and compulsion, held ineffectual); Greeno *v.* Greeno, 23 Hun, 478, 481 (1881); National Co. *v.* Haley, 78 Me. 268 (1886); Conn. Mutual Co. *v.* Baldwin, 15 R. I. 106 (1885); Hubbard *v.* Stapp, 32 Ill. App. 541 (1889; where the doctrine was applied, notwithstanding a provision that payment should be made to the insured himself, should he survive a certain period, and was held to apply whether or not the beneficiary is a *volunteer*). See Hooker *v.* Sugg, 102 N. C. 115, 120 (1889); City Savings Bank *v.* Whittle, 63 N. H. 587 (1885); Landrum *v.* Knowles, 22 N. J. Eq. 594 (1871); Basye *v.* Adams, 81 Ky. 368 (1883); Pace *v.* Pace, 19 Fla. 438 448 (1882); Ætna Co. *v.* Mason, 14 R. I. 583 (1884); Fortescue *v.* Barnett, 3 Mylne & K. 36 (1834).

The right of the beneficiary to possession of the policy, as against mere strangers, was declared in Allis *v.* Ware, 28 Minn. 166 (1881).

A policy issued in place of a policy surrendered in violation of the rights of the beneficiary, held, nevertheless, enforcible against the insurer by way of estoppel, in favor of one receiving such second policy in good faith. Pilcher *v.* N. Y. Co., 33 La. Ann. 322 (1881). But in Putnam *v.* N. Y. Co., 7 Southern Rep. 602 (Supm. Ct. La. 1890), the evidence was held insufficient to establish such an estoppel. Compare Barry *v.* Brune, 71 N. Y. 261 (1877) Where a policy was a contract creating an irrevocable trust in favor of the beneficiary, and the insured surrendered the policy, taking out in place thereof a second policy, stating that it was *in continuation of the original one*, the second policy was

ingly, as it were, and with a tendency to rely on the particular circumstances of the case.[1] Assuming, however, that

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held to create no liability against the insurer. Pingrey *v.* National Co., 144 Mass. 374 (1887).

A mere designation by will does not create a vested interest, and such designation may be revoked. Swift *v.* Railway Passenger Assoc., 96 Ill. 309 (1880).

But the doctrine of irrevocability, though shown to be supported by the overwhelming weight of authority. was denied in Clark *v.* Durand, 12 Wis. 223 (1860), on the ground, as it would seem, that the beneficiary is a stranger to the contract, a mere volunteer. Here, however, the insured retained possession of the policy and paid the premium; S. P., Foster *v.* Gile, 50 Wis. 603 (1880); Breitung's Estate, 46 Northwestern Rep. 871 (Supm. Ct. Wis. 1890; where, however, it is not clear from the report, who had possession of the policy). See, however, dissenting opinion of Cassoday, J., in 47 Id. 17. And the cases in 12 and 50 Wis. were cited with apparent approval in Union Mutual Co. *v.* Stevens, 19 Fed. Rep 671, 674 (1883). See Lamont *v.* Hotel Men's Assoc., 30 Fed. Rep. 817 (1887). A policy in trust held not to create an irrevocable interest, where the insured retained possession of the policy and paid the premiums. Jarvie *v.* Jarvie, 14 Scotch Session Cases, 4th series, 411 (1887; where, on the death of the insured, the proceeds were held to form part of his estate).

[1] Thus the following are cases where it is not clear that the doctrine of irrevocability was broadly laid down, but the circumstances were held sufficient to show that an irrevocable interest was created. In Ruppert *v.* Union Mutual Co., 7 Robt. 155 (1867), a provision in the charter of the company was the special circumstance. In Ferdon *v.* Canfield, 104 N. Y. 143 (1887), by the terms of the contract the beneficiaries were parties thereto, and the premiums were payable by them. In Pingrey *v* National Co., 144 Mass. 374 (1887), the mother of the insured was the beneficiary. It appeared that before the policy was issued, there was an understanding between her and the insured, that the policy should be for her benefit. She also contributed toward payment of the first premium, but he paid the subsequent premiums. He told her he had taken out the policy, and showed it to her, but she never had possession of it. This was a case of an endowment policy, where the amount thereof was to be paid to the insured himself as soon as the premiums and other payments should amount to that sum. See also, Lemon *v.* Phœnix Co., 38 Conn. 294 (1871). Crittenden *v.* Phœnix Co., 41 Mich. 442 (1879), was a case where stress was laid on

the beneficiary has a vested right in the contract, it follows that any attempt to divest him of such right without his consent is an utter nullity, and that his right to the *whole* value of the contract continues unimpaired.[1]

§ 75. **Reservation of right to assign without such consent.**—Of course, the right to divest the interest of the beneficiary without his consent, may be reserved in any contract of insurance,[2] but it is especially in case of mutual benefit

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the fact of the *delivery* of the policy. Brockhaus *v.* Kemna, 7 Fed. Rep. 609 (1881), was a case of a paid-up policy, where the insured, having himself received the insurance money as guardian of the beneficiary, was declared to hold it for her benefit. In Pilcher *v.* N. Y. Co., 33 La. Ann. 322 (1881), the wife of the insured was the beneficiary, and paid the premiums. But the same rule was applied, in Putnam *v.* N. Y. Co., 7 Southern Rep. 602 (Supm. Ct. La. 1890), where the husband paid the premiums. In Garner *v.* Germania Co., 110 N. Y. 266 (1888), the policy was expressed to be *in trust* for the children of the insured. He did not deliver the policy to them, but kept it in his own possession, and paid the premiums out of his own moneys. Yet there was held to be an irrevocable interest. In Butler *v.* State Mutual Co., 55 Hun, 296 (1890), the policy was taken out in favor of B *in trust* for S, who was not related to the insured. Held that, on delivery of the policy to B, S took a vested interest in the policy, that could not, without her consent, be divested, though it would seem that the insured paid the premiums himself. In Phipard *v.* Phipard, 55 Hun, 433 (1890), the evidence was held sufficient to impress a policy with a trust in favor of persons who were not named in the policy, but to one of whom there was a constructive delivery of it. That the general question was not decided in Glanz *v.* Gloeckler (see § 76), see Johnson *v.* Van Epps, 110 Ill. 551, 558 (1884).

[1] Pilcher *v.* N. Y. Co., 33 La. Ann. 322, 331 (1881); Putnam *v.* N. Y. Co., 7 Southern Rep. 602 (Supm. Ct. La. 1890). This is preferable to Landrum *v.* Knowles, 22 N. J. Eq. 594 (1871), where the beneficiary was held only entitled to the value of the policy *at the time of the transfer* (*i. e.* premiums already paid). As to lien of assignee for premiums or assessments paid, see § 127.

[2] Under provision for payment to the "assured, his executors, administrators and *assigns*," held that the contract was assignable by the insured. N. Y. Co. *v.* Flack, 3 Md. 341, 352 (1852). Compare Weisert *v.* Muehl, § 74, note 2, p. 123.

insurance, that the right of the insured to change the beneficiary, is commonly expressly reserved.[1] In such case, the question of the validity of a designation of a *new* beneficiary, is usually in effect the same as if the designation were the original one.[2] It may be added, that there is no

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Where the right to change the beneficiary is merely *reserved*, the presumption is that the original designation continues. Laudenschlager *v.* Northwestern Endowment Assoc., 36 Minn. 131 (1886).

[1] In Iowa the power is given by statute to a member of a benefit society, to change the beneficiary without the consent of the latter. See Brown *v.* Grand Lodge A. O. U. W., 45 Northwestern Rep. 884 (Supm. Ct. Iowa, 1890). So by statute in New York (L. 1889, c. 520, § 12), and perhaps elsewhere. As to mode of change of beneficiary in contract of benefit insurance, see Deady *v.* Bank Clerks' Assoc., 49 N. Y. Super. Ct. 246 (1883); Renk *v.* Herrman Lodge, 2 Dem. 409 (1884); Sabin *v.* Grand Lodge A. O. U. W., 6 N. Y. State Reporter, 151 (1887); 8 N. Y. Suppl. 185 (1889); Mayer *v.* Equitable Reserve Fund Assoc., 17 N. Y. State Reporter, 525 (1888); Gladding *v.* Gladding, 8 N. Y. Suppl. 880 (1890); Nally *v.* Nally, 74 Ga. 669 (1885); Jinks *v.* Banner Lodge Knights of Honor, 20 Atlantic Rep. 4 (Supm. Ct. Pa. 1891); American Legion of Honor *v.* Smith, 45 N. J. Eq. 466 (1889); Fisk *v.* Equitable Aid Union, 20 W. N. C. (Pa.), 290 (1887); Davidson *v.* Supreme Lodge Knights of Pythias, 22 Mo. App. 263 (1886); National American Assoc. *v.* Kirgin, 28 Mo. App. 80 (1887); Schillinger *v.* Roes, 85 Ky. 357 (1887); Bowman *v.* Moore, 25 Pacific Rep. 409 (Supm. Ct. Cal. 1890).

Under a charter declaring that payment should be made "as may be designated in the application," and that, "this being changed by death or otherwise impossible, it shall go" in a mode specifically provided, held that neither the insurer nor the insured could change the beneficiary. Presbyterian Mutual Fund *v.* Allen, 106 Ind. 593 (1886). Where the certificate provided that it might be "assigned, transferred or set over by and with the consent of the association," held that assignment by the *beneficiary only*, and not by the insured, was authorized. Block *v.* Valley Mutual Assoc., 52 Ark. 201 (1889). In case of an invalid designation of a new beneficiary, the original designation held to remain in force. Elsey *v.* Odd Fellows' Mutual Relief Assoc., 142 Mass. 224 (1886).

[2] See Marsh *v.* American Legion of Honor, 149 Mass. 512, 515 (1889); Masonic Society *v.* Burkhart, 110 Ind. 189 (1886); Holland *v.* Taylor, 111 Ind. 121, 126 (1887); Milner *v.* Bowman, 119 Ind. 448 (1889); Lorsher *v.* Supreme Lodge Knights of Honor, 72 Mich. 316, 321

inherent difference whatever, between mutual benefit societies and ordinary insurance companies, as to the right to change the beneficiary,[1] the only difference in this regard, being the circumstance that the right is more commonly reserved in case of mutual benefit insurance. It scarcely needs saying, by way of reminder, that the provision for such change may be found, not only in the certificate or other instrument directly evidencing the contract, but in the statutes or by-laws applicable. Indeed, it is most frequently to be found in the statutes, or by-laws having the force of statutes.[2] Even a statute enacted subsequently to the making of the contract, may properly modify the provision for change, where it can be done without interfering with vested rights.[3] Whether, to make

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(1888); Martin *v.* Stubbings, 126 Ill. 387, 404 (1888); Metropolitan Co. *v.* Schaffer, 50 N. J. Law, 72 (1887); Tennessee Lodge *v.* Ladd, 5 Lea (Tenn.), 716 (1880); Catholic Knights of America *v.* Morrison, 16 R. I. 468 (1889); Splawn *v.* Chew, 60 Tex. 532 (1883); Lamont *v.* Hotel Men's Assoc., 30 Fed. Rep. 817 (1887); Lamont *v.* Grand Lodge Iowa Legion of Honor, 31 Fed. Rep. 177 (1887); Schillinger *v.* Boes, 85 Ky. 357 (1887); Titsworth *v.* Titsworth, 40 Kans. 571 (1889); Barton *v.* Provident Mutual Assoc., 63 N. H. 535 (1885); Knights of Honor *v.* Watson, 64 N. H. 517 (1888). With Metropolitan Co. *v.* Schaffer, above, compare Carraher *v.* Metropolitan Co., 11 N. Y. State Reporter, 665 (1887). As to the original beneficiary being presumed to know that his rights are subject to be divested, see Beatty's Appeal, 122 Pa. St. 428 (1888).

[1] Weisert *v.* Muehl, 81 Ky. 336, 340 (1883); Van Bibber *v.* Van Bibber, 82 Ky. 347, 350 (1884); Block *v.* Valley Mutual Assoc., 52 Ark. 201, 206 (1889). It seems to have been thought in the following cases that there is an *inherent* difference. Presbyterian Mutual Fund *v.* Allen, 106 Ind. 593, 596 (1886); Milner *v.* Bowman, 119 Ind. 448, 452 (1889); Martin *v.* Stubbings, 126 Ill. 387, 404 (1888); Supreme Conclave Royal Adelphia *v.* Cappella, 41 Fed. Rep. 1 (1890); Brown *v.* Grand Lodge A. O. U. W., 45 Northwestern Rep. 884 (Supm. Ct. Iowa, 1890). But see Holland *v.* Taylor, 111 Ind. 121, 126 (1887).

[2] See note 1, p. 127.

[3] Marsh *v.* American Legion of Honor, 149 Mass. 512, 515 (1889). To similar effect, Masonic Society *v.* Burkhart, 110 Ind. 189, 193 (1886).

such statute applicable to any particular contract, it must receive the formal assent of the insuring society (as by by-law), would seem to depend on the particular provisions of the statute itself, as well as on the other provisions of the contract.[1] Of course, the statute or other special provision in the contract authorizing such change, is what is primarily to be considered in each case; hence general rules are less practicable to lay down. The question that has evolved the greatest difference of opinion in this connection is, whether the change must be in the *manner* authorized by the contract, to be binding on the beneficiary whose rights are sought to be taken away. On principle it would seem, that if, as between the parties to the contract, the right to *make* such change is clearly indicated, the mere *mode* agreed upon by them (usually for convenience merely), for making such change, may, as between them, be altered, and this view seems sustained by the weight of authority.[2] But, apart from the

[1] Thus the statute was held not applicable to a subsequent contract, in the absence of by-laws passed to bring such contracts within its provisions. American Legion of Honor *v.* Perry, 140 Mass. 580 (1886). See also, Elsey *v.* Odd Fellows' Relief Assoc., 142 Mass. 224 (1886); Tyler *v.* Same, 145 Mass. 134 (1887).

[2] It was so held in Martin *v.* Stubbings, 126 Ill. 387, 407 (1888); Splawn *v.* Chew, 60 Tex. 532 (1883); Stewart *v.* Supreme Council American Legion of Honor, 36 Mo. App. 319, 330 (1889); Manning *v.* A. O. U. W., 86 Ky. 136 (1887); Supreme Council Royal Adelphia *v.* Cappella, 41 Fed. Rep. 1 (1890). So, where mode was altered by by-law passed after designation of original beneficiary, and so held, notwithstanding he had possession of the original certificate. Byrne *v.* Casey, 70 Tex. 247 (1888); Catholic Knights of America *v.* Morrison, 16 R. I. 468 (1889). And so in a case where the insurer had paid into court the amount in dispute. Titsworth *v.* Titsworth, 40 Kans. 571 (1889). But, inasmuch as the consent of the insurer is, ordinarily at least, necessary to effectuate the change, it was held that the insurer might disregard a change not made according to the mode authorized. Coleman *v.* Supreme Lodge Knights of Honor, 18 Mo. App. 189 (1885). So the beneficiary, a change not assented to by the insurer. American Legion

question of assent by the insurer, what may be called the doctrine of *substantial compliance*, is frequently applied, in determining the validity of an attempted change, and, in accordance therewith, the change is frequently valid, notwithstanding the omission of formalities that it has become impracticable to perform.[1] The provisions for change, as ordinarily made, do not seem to contemplate a change by will, though, of course, a change by will may, by express agreement to that effect, be authorized.[2]

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of Honor *v.* Smith, 45 N. J. Eq. 466, 472 (1889). And, contrary to the view approved in the text, are the following cases, holding that the change must be in the manner authorized by the contract, to be binding on the beneficiary whose rights are sought to be taken away. Holland *v.* Taylor, 111 Ind. 121, 130 (1887); Wendt *v.* Iowa Legion of Honor, 72 Iowa, 682 (1887); Hotel Men's Assoc. *v.* Brown, 33 Fed. Rep. 11 (1887). And see Ireland *v.* Ireland, 42 Hun, 212 (1886). But in Hirschl *v.* Clark, 47 Northwestern Rep. 78 (Supm. Ct. Iowa, 1890), a change was sustained, though not conforming to a mere regulation of the company, that did not form part of the contract of insurance.

[1] So held, notwithstanding the failure to surrender the certificate according to the contract, it appearing that such certificate had been lost. Grand Lodge A. O. U. W. *v.* Child, 70 Mich. 163 (1888). So where it was in the possession of the original beneficiary and beyond the control of the insured. Supreme Conclave Royal Adelphia *v.* Cappella, 41 Fed. Rep. 1 (1890); Hirschl *v.* Clark, 47 Northwestern Rep. 78 (Supm. Ct. Iowa, 1890); Isgrigg *v.* Schooley, 25 Northeastern Rep. 151 (Supm. Ct. Ind, 1890). So in Marsh *v.* American Legion of Honor, 149 Mass. 512 (1889), the change was held valid, notwithstanding that, owing to fraud on the part of the original beneficiary, certain formalities were omitted. Change held valid in equity, notwithstanding death of the insured prior to issuing of certificate to new beneficiary. National American Assoc. *v.* Kirgin, 28 Mo. App. 80 (1887); Luhrs *v.* Luhrs, 123 N. Y. 367 (1890). So, even where the notification to make the change did not reach the insurer until after the death of the insured. Hirschl *v.* Clark, 47 Northwestern Rep. 78 (Supm. Ct. Iowa, 1890).

[2] A change by will was held unauthorized, in American Legion of Honor *v.* Perry, 140 Mass. 580, 589 (1886); Holland *v.* Taylor, 111 Ind. 121 (1887): Stephenson *v.* Stephenson, 64 Iowa, 534 (1884); Vollman's Appeal, 92 Pa. St. 50 (1879); Olmstead *v.* Masonic Mutual Soc., 37 Kans. 93 (1887); Hellenberg *v.* District No. 1 of B'nai Berith, 94

§ 76. Effect of death of beneficiary.—In case of the death of the beneficiary, before the happening of the event on which performance by the insurer is conditioned, it is an easy inference from what has been said on the subject of irrevocability of interest, that the interest of the insured is a vested, valuable right, that, like his other property, passes to his representatives.[1] And it would seem to be a

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N. Y. 580 (1884; where, however, the insurer had no knowledge of the will till after the death of the insured). Indeed, it was laid down in Holland *v.* Taylor, above, that to validate a change by will, there must be express authority in the contract to that effect. To same effect seems McClure *v.* Johnson, 56 Iowa, 620 (1881). In Raub *v.* Masonic Mutual Assoc., 3 Mackey (D. C.), 68 (1884), the right to make a change by will, was held sufficiently given by a provision of the charter, that the objects of the association should be to furnish a fund for the "widows, orphans, heirs, assigns or *legatees*" of the member, and held that such right could not be cut off or diminished by a by-law. And in Weil *v.* Trafford, 3 Tenn. Ch. 108 (1875), the authority was held sufficient. And in Hainer *v.* Iowa Legion of Honor, 78 Iowa, 245 (1889), the original beneficiary, having taken a benefit under the will, was held estopped to dispute the validity of the change. In Greeno *v.* Greeno, 23 Hun, 478 (1881), a power to change by will was held not effectively exercised by a residuary clause. This on the ground that the intention to exercise such power must be expressed in clear and unmistakable terms.

[1] Continental Co. *v.* Palmer, 42 Conn. 60 (1875); Phœnix Co. *v.* Dunham, 46 Conn. 79 (1878); Cables *v.* Prescott, 67 Me. 582 (1878; policy in trust); Conigland *v.* Smith, 79 N. C. 303 (1878); Simmons *v.* Biggs, 99 N. C. 236 (1888); Drake *v.* Stone, 58 Ala. 133 (1877); Conn. Mutual Co. v. Baldwin, 15 R. I. 106 (1885); Taylor *v.* National Temperance Union, 94 Mo. 35, 42 (1887; benefit certificate). So in Hutson *v.* Merrifield, 51 Ind. 24, 30 (1875), where the policy was on a husband's life in favor of his wife, and payable to "her executors, administrators and assigns." So in Macaulay *v.* Central Nat. Bank, 27 So. Car. 215 (1886), where payment was to be to the beneficiaries, "share and share alike, *or their legal representatives.*" In Robinson *v.* Duvall, 79 Ky. 83 (1880), a contract for the benefit of the wife and children of the insured, "or their representatives," was held to be for the benefit of the only child of the last survivor of the children. In Shields *v.* Sharp, 35 Mo. App. 178, 182 (1889), it is stated: "This rule is of general application *only* when

corollary from this proposition, that the interest of the beneficiary, being during his life irrevocable, continues irrevocable after his death, so that the interest of his representatives cannot be divested without their consent.[1]

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the contract of insurance is made by the beneficiary, and the premiums paid by him, or some third person for him." But this we regard as unsound. In Washington Central Bank *v.* Hume, 128 U. S. 195, 205 (1888), there is a dictum that if the insured pays the premiums and survives the beneficiary, "it might reasonably be claimed, in the absence of a statutory provision to the contrary, that the policy would enure to his estate." Here the court attempt to distinguish Continental Co. *v.* Palmer, as resting on a statutory provision, but we think that an examination of that case will show the decision to have been on common law grounds. See also, Evans *v.* Opperman, 76 Tex. 293, 300 (1890); Keller *v.* Gaylor, 40 Conn. 343 (1873). See, however, under statute, Continental Co. *v.* Webb, 54 Ala. 688, 700 (1875). In Foster *v.* Gile, 50 Wis. 603 (1880), although the interest of the beneficiary was declared revocable by the insured, it was held so far vested as to pass to the representatives of the beneficiary on his death, in the absence of such revocation.

[1] In Glanz *v.* Gloeckler, 104 Ill. 573 (1882), the daughter of the insured was the beneficiary, and her personal representatives were held to take on her death an interest that the insured, who was still alive, could not revoke, *although he had paid all the premiums and retained possession of the policy*. The policy, however, recited the first premium as having been paid by the beneficiary. This is difficult to reconcile with Union Mutual Co. *v.* Stevens, 19 Fed. Rep. 671 (1883); Bickerton *v.* Jaques, 28 Hun, 119 (1882), where an opposite conclusion was reached on what seems to have been essentially the same state of facts. So in Shields *v.* Sharp, 35 Mo. App. 178 (1889), where stress was laid on the circumstance of payment of the premiums, by the insured. But it is stated that this would not apply, where the deceased beneficiary held for value. The question did not arise, however, as the insured, after the death of one of several beneficiaries, made no attempt to revoke the interest, and continued to pay the premiums. The interest was held to pass, not to the surviving beneficiaries, but to the insured, as representative of the deceased beneficiary. In Gambs *v.* Covenant Mutual Co., 50 Mo. 44 (1872), a change in favor of the second wife of the insured, was sustained as against the representatives of his first wife, who was the original beneficiary. Compare Cyrenius *v.* Mutual Co., 13 N. Y. State Reporter, 204

And, even in case of a *revocable* interest, so long as the power of revocation is not exercised, there seems no valid reason why the same rule should not apply.[1] Of course, however, the provisions of the contract may be such that the death of the beneficiary will terminate his interest,[2] and this is particularly the case in contracts of mutual benefit insurance.[3]

§ 77. **The contract as subject to claims of creditors.**— The contract of insurance being a contract to pay, and hence a chose in action, is, like choses in action generally, not subject to attachment or execution, save where the rule is made otherwise by statute.[4] But the equitable

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(1887), where the evidence was held to be such as to indicate that the beneficiary obtained and retained control of the policy.

[1] So held in Clark *v.* Equitable Aid Union, 6 Pa. Co. 321 (1888).

[2] Conn. Mutual Co. *v.* Burroughs, 34 Conn. 305 (1867); Hutson *v.* Merrifield, 51 Ind. 24, 29 (1875); Brown's Appeal, 125 Pa. St. 303 (1889). Held that a power reserved to substitute a new beneficiary on the death of the original one, must be exercised within a reasonable time; that it could not be so exercised after the date fixed for the next ensuing premium. Eiseman *v.* Judah, 1 Flippin, 627 (1877). See generally as to such provisions, Michigan Mutual Benefit Assoc. *v.* Rolfe, 76 Mich. 146, 153 (1889); Given *v.* Wisconsin Odd Fellows' Mutual Co., 71 Wis. 547 (1888); Riley *v.* Riley, 75 Wis. 464 (1890); Richmond *v.* Johnson, 28 Minn. 447 (1881); Expressmen's Aid Soc. *v.* Lewis, 9 Mo. App. 412 (1880); Van Bibber *v.* Van Bibber, 82 Ky. 347 (1884); Masonic Mutual Relief Assoc. *v.* McAuley, 2 Mackey (D. C.), 70 (1882). Even where the designation was of a wife *or her legal representatives*, her death was held to terminate her interest. Washington Beneficial Endowment Assoc. *v.* Wood, 4 Mackey (D. C.), 19 (1885). See Foster *v.* Gile, 50 Wis. 603 (1880); Tennes *v.* Northwestern Mutual Co., 26 Minn. 271 (1879); Laudenschlager *v.* Northwestern Endowment Assoc., 36 Minn. 131 (1886). It is, perhaps, doubtful whether all these decisions can be reconciled with the doctrine stated in the text, and some of them seem based on a supposed *inherent* distinction between mutual benefit and other insurance, in this respect.

[3] See cases cited in note 2, above.

[4] As, for instance, in New York, by Code Civ. Pro. § 648. See Hankinson *v.* Page, 12 Civ. Pro. R. 279 (1887).

principles that have enabled creditors, in proper proceedings, to reach the interest of the debtor in choses of action, have been applied to contracts of insurance. As, generally speaking, it is only the property of the debtor himself that is subject to the claims of his creditors, it is first to be determined in each case, whether the debtor has any interest or property in the contract in question. In case of a contract entered into by the insured for the benefit of a third person, if, as we have seen the prevailing doctrine to be, the beneficiary has a vested irrevocable interest, it logically follows, that, as the insured has no interest or property in the contract, there is no interest or property therein that his creditors can reach.[1] But where the

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A policy payable to the legal representatives of insured, held not subject to attachment during his life. Day *v.* New England Co., 111 Pa. St. 507 (1886). A policy held not seizable under execution as "security for money" under statute. *Re* Sargent's Trusts, 7 L. R. (Irish), 66 (1879).

[1] Thus, on the death of the insured, his wife, who was the beneficiary, was held not bound, on the application of creditors, to inventory the policy as a part of the estate. Succession of Hearing, 26 La Ann. 326 (1874). And the wife was held entitled to such policy, free from the claims of creditors of her deceased husband, in Succession of Clark, 27 La. Ann. 269 (1875); Succession of Bofenschen, 29 La. Ann. 711 (1877). So where the "heirs or assigns" were the beneficiaries. Mullins *v.* Thompson, 51 Tex. 7 (1879). So in case of insolvency of the insured. *Ex parte* Spiers, 9 Lower Canada, 450 (1859). See also, Ashby *v.* Costin, 21 L. R. Q. B. D. 401 (1888); Brossard *v.* Massôuin, 4 Ins. L. J. 395 (1875). The assignee in bankruptcy of insured, held to have no interest in a policy expressed to be made "for the benefit of the estate of the insured." Pace *v.* Pace, 19 Fla. 438, 448 (1882). So the interest of a beneficiary under a benefit certificate held not subject to the claims of creditors of the insured. Beeckel *v.* Imperial Council United Friends, 11 N. Y. Suppl. 321 (1890).

On the same principle, entering into a contract of insurance for the benefit of another than the insured, is not a *transfer of property*, assailable by creditors of the insured. McCutcheon's Appeal, 99 Pa. St. 133 (1881; where, however, there was a statute providing that such contracts should be free from the creditors of the insured); Washington

contract is for his own benefit, a different rule applies, and hence there is here an interest or property [1] that his creditors

Central Bank *v.* Hume, 128 U. S. 195 (1888). In each of these cases the wife of the insured was the beneficiary. A similar view was taken in Pence *v.* Makepeace, 65 Ind. 345, 360 (1879), where, however, it was unnecessary to decide the question. See Barnes *v.* Vetterlein, 16 Fed. Rep. 218 (1882). This view is decidedly preferable to that taken in Fearn *v.* Ward, 80 Ala. 555 (1886), where the procurement of a policy in favor of the child of the insured, was held a voluntary conveyance, void as to existing creditors, *though no fraud may have been intended.* It is true that here the contract was directly with the insured, instead of with the beneficiary, as in the case in 128 U. S., but in 128 U. S. 206, this difference is regarded as unimportant. And such seems to be the effect of Freeman *v.* Pope, 9 L. R. Eq. 206 (1869). See also, Tompkins *v.* Levy, 87 Ala. 263, 266 (1888). Again, in Stokes *v.* Coffey, 8 Bush (Ky.), 533, 539 (1871), the procurement of a policy in favor of the wife of the insured, was held a voluntary conveyance, void as to existing creditors, but here the decision is partially, at least, rested on the ground of *fraud.* And in the same case, though a policy in favor of a creditor, was held to have the effect of preferring him to other creditors, yet held that the *excess* of the proceeds over the amount necessary to indemnify him, should be applied for the benefit of *other* creditors. Here the premiums seem to have been paid by the insured. In Fearn *v.* Ward, the remedy of the creditors was held not limited merely to the premiums that had been paid by the insured, with interest (as to which see note 2, p. 136), but to extend to the entire proceeds of the policy. So in Stokes *v.* Coffey. But where it did not appear that the premiums had been paid by the husband, his creditors were held not entitled to the proceeds of the policy. Stokes *v.* Coffey. A change from the wife to the children of the insured, as beneficiaries in a benefit certificate, held not fraudulent as to creditors of the wife, her interest in the contract not being a vested one. Schillinger *v.* Boes, 85 Ky. 357, 362 (1887). As to effect of statutory provisions, see note at end of this chapter.

[1] Thus a policy on the life of an insolvent debtor, and payable to him, was held to pass to his assignee in insolvency under the statute. Bassett *v.* Parsons, 140 Mass. 169 (1885). But held otherwise in proceedings under the Federal statute, of a policy payable to his " executors, administrators or assigns." Matter of McKinney, 15 Fed. Rep. 535 (1883). See Russell's Policy Trusts, 15 L. R. Eq. 26 (1872); Alletson *v.* Chichester, 10 L. R. C. P. 319 (1875); Heyman *v.* Dubois, 13 L. R. Eq. 158 (1871); *Ex parte* Caldwell, 13 L. R. Eq. 188 (1871); Board of

can reach. And the rules governing the transfer of property in fraud or hindrance of the rights of creditors, are applicable to the transfer of the interest of the debtor in a contract of insurance.[1] So, even where he has no interest in the contract itself, yet the payment of premiums by him for the benefit of the beneficiary is, it would seem, governed by the general rules applicable to the diversion of property in fraud or hindrance of creditors.[2]

Trade *v.* Block, 13 L. R. App. Cas. 570 (1888); *Re* Hickey, 10 Irish Rep. (Equity), 117 (1875). And where by the policy the amount was payable to the insured on *a day named*, the policy was held to pass to the assignee under the Federal statute. Brigham *v.* Home Co., 131 Mass. 319 (1881; where the assignee was allowed to maintain a suit in equity to recover possession of the policy). As to effect of assignment for creditors of all one's property, except such "as is by law exempt from attachment," see Rhode Island Bank *v.* Chase, 16 R. I. 37 (1887). As to application of proceeds of contract to claims of creditors, under Iowa statute, see Smedley *v.* Felt, 43 Iowa, 607 (1876); Murray *v.* Wells, 53 Iowa, 256 (1880). Compare Friedlander *v.* Mahoney, 31 Iowa, 311 (1871).

[1] Thus assignment of insurance contract in trust for wife of insured, held fraudulent and void as against his creditors. Elliott's Appeal, 50 Pa. St. 75 (1865). Compare McCord *v.* Noyes, 3 Bradf. (N. Y.), 139 (1855). So of a policy in wife's favor, taken out on surrender of a policy payable to representatives of insured. Stokes *v.* Coffey, 8 Bush (Ky.), 533, 536 (1871). And in Thompson *v.* Cundiff, 11 Bush (Ky.), 567, 574 (1875), where the policy was in favor of the wife of insured, the creditors were "doubtingly" held entitled to the *premiums*, though not to the whole proceeds of the policy. There was, however, no proof of fraud. So under Virginia statute. Stigler *v.* Stigler, 77 Va. 163 (1883). But an assignment of a policy while insolvent to a creditor, under an agreement that he should retain from the proceeds the amount due him, and pay the surplus to the heirs or to the order of the insured, was sustained in the absence of fraud. Johnson *v.* Alexander, 25 Northeastern Rep. 706 (Supm. Ct. Ind. 1890). Assignment of policy held fraudulent as to creditors, under English statute. Stokoe *v.* Cowan, 29 Beavan, 637 (1861). See also cases cited in note 1, p. 134.

[2] In Washington Central Bank *v.* Hume, above, the creditors were, in the absence of proof of fraud, held not entitled to the premiums that had been paid by the insured while insolvent. Compare Fearn *v.* Ward; Stokes *v.* Coffey (note 1, p. 134).

Note on Statutory Protection of Rights of Beneficiary.

§ 78. **General scope and effect of provisions for such purpose.**—There have been enacted in various jurisdictions, notably the State of New York, statutes designed to secure the rights of beneficiaries, especially the wife of the insured. In view of doctrines that, as we have seen, seem to be established, such statutes must, to some extent at least, be regarded as merely declaratory. It has been held that such statutes, so far as they exempt the proceeds of the contract from creditors, are in the nature of exemption laws and to be liberally construed. Tompkins *v.* Levy, 87 Ala. 263, 267 (1888; where also the wife's interest was held to cease on her death). As to Florida statute, see Eppinger *v.* Canepa, 20 Fla. 262, 281 (1883); Pace *v.* Pace, 19 Fla. 438, 451 (1882): Kentucky statute, Thompson *v.* Cundiff, 11 Bush (Ky.), 567 (1875); Schillinger *v.* Boes, 85 Ky. 357, 365 (1887): Mississippi statute, Yale *v.* McLaurin, 66 Miss. 461 (1889; where it was held that to obtain the benefit of the statute, the beneficiary must be another person than the one paying premiums): Ohio statute, Fraternal Mutual Co. *v.* Applegate, 7 Ohio St. 292 (1857; holding wife to be *feme sole* in respect to the policy): Missouri statute, Baker *v.* Young, 47 Mo. 453 (1871): Canadian statute, Wicksteed *v.* Munro, 13 Ontario App. 486 (1886; interest of beneficiary held to cease on his death, and not to pass to his assignees or legal representatives); Toronto General Trusts Co. *v.* Sewell, 17 Ontario App. 442 (1889; policy effected before marriage, held not brought within the statute by declarations or indorsements of the insured after marriage): English statute, *Re* Adams' Policy Trusts, 23 L. R. Ch. D. 525 (1883); *Re* Mellor's Policy Trusts, 6 L. R. Ch. D. 127 (1877); 7 Id., 200 (1877): Scotch statute, Schumann *v.* Scottish Widows' Fund Soc., 13 Scotch Session Cases, 4th series, 678 (1886).

In New York, a series of statutes commencing with L. 1840, c. 80, were enacted for this purpose. In accordance with what is perhaps a questionable construction placed upon that statute, it has been uniformly held, that in case of a policy taken out in accordance with those

statutes, for the benefit of the wife and children of the insured, an irrevocable interest was created in them, such that the insured could not thereafter divest it. U. S. Trust Co. *v.* Mutual Benefit Co., 115 N. Y. 152 (1889), and cases cited below; though a contrary view was taken under the Wisconsin statute. Kerman *v.* Howard, 23 Wis. 108 (1868). And the interest is held thus vested, even without the policy being delivered to the beneficiaries. Whitehead *v.* N. Y. Co., 102 N. Y. 143, 152 (1886). So under R. I. statute, Ætna Co. *v.* Mason, 14 R. I. 583 (1884). Thus it has been held that the insured could not *surrender* the policy without the consent of the wife. Matter of Booth, 11 Abb. N. C. 145, 149 (1882); or allow a third person to obtain a lien on the policy, by paying premiums. Lockwood *v.* Bishop, 51 How. Pr. 221, 224 (1876). And the same rule was applied to a policy taken out for the benefit of the *wife alone.* People *v.* Globe Mutual Co., 15 Abb. N. C. 75 (1884). Under a statute substantially like that in N. Y., a policy received by the insured on surrendering the original policy, was held to belong in equity to the beneficiaries. Chapin *v.* Fellowes, 36 Conn. 132 (1869). So, where the wife had died, it was held that he could not surrender the policy without the consent of the *children.* Whitehead *v.* N. Y. Co., 63 How. Pr. 394 (1882). See as to meaning of "children" in Alabama statute, Continental Co. *v.* Webb, 54 Ala. 688 (1875).

And under these statutes it was held that even the wife herself could not assign her interest during the life of her husband. Eadie *v.* Slimmon, 26 N. Y. 9 (1862); Barry *v.* Equitable Co., 59 N. Y. 587 (1875); Wilson *v.* Lawrence, 13 Hun, 238; affirmed in 76 N. Y. 585 (1879); Brick *v.* Campbell, 122 N. Y. 337, 345 (1890). So, notwithstanding her guaranty of the validity of the assignment. De Jonge *v.* Goldsmith, 46 N. Y. Super. Ct. 131; affirmed, it seems, in 86 N. Y. 614 (1881); and notwithstanding her covenant, that the assignment is valid and sufficient, and that, whenever required, she will, in order to carry out the design of the assignment, do any other act necessary for that purpose. Brick *v.* Campbell (p. 347), above. And a policy re-

ceived by the assignee upon his collusively surrendering the original policy, was declared invalid. Barry *v.* Brune, 71 N. Y. 261 (1877). In this case, however, the assignment was also held assailable as having been obtained by coercion. Compare Whitridge *v.* Barry, 42 Md. 140 (1874).

And the following cases are further illustrations of the scope of the act of 1840, and the subsequent statutes. In Brick *v.* Campbell (p. 345), above, these statutes were held to apply to policies issued by a corporation of another State. In Mutual Co. *v.* Terry, 62 How. Pr. 325 (1882), the assignment was held invalid, even though made out of the State; also held that indorsing the policy as "paid-up" did not make it assignable. So in People *v.* Globe Mutual Co., 15 Abb. N. C. 75 (1884), a paid-up policy issued in continuation of the original policy, was held non-assignable. But the assignability of an *endowment* policy issued before the enactment of L. 1866, c. 656, was held not affected by these statutes. Living *v.* Domett, 26 Hun, 150 (1881). Otherwise of an endowment policy issued after the enactment of the act of 1866. Brummer *v.* Cohn, 86 N. Y. 11, 16 (1881); overruling dictum in Fowler *v.* Butterly, 46 N. Y. Super. Ct. 148, 159 (1878). See Brick *v.* Campbell (p. 344), above. A policy held within the protection of the Rhode Island statute, notwithstanding that it was payable to the husband in case of the death of the wife before the time for payment. Ætna Co. *v.* Mason, 14 R. I. 583 (1884).

The rights of a member of a *benefit society* were held not controlled by these statutes, and hence held that the constitution of the society could be changed so as to make the insurance payable to another than the wife or children originally designated. Durian *v.* Central Verein, 7 Daly, 168 (1877).

In other jurisdictions, under statutory provisions the same as or similar to those in New York just referred to, a different conclusion has been reached from that stated, and it has been held that a policy in favor of a wife was assignable by her. Charter Oak Co. *v.* Brant, 47 Mo. 419 (1871); Baker *v.* Young, Id. 453 (1871); Conn. Mutual Co. *v.* Ryan, 8 Mo. App. 535 (1880); Archibald *v.* Mutual Co.,

38 Wis. 542 (1875); DeRonge *v.* Elliott, 23 N. J. Eq. 486 (1873); Emerick *v.* Coakley, 35 Md. 188 (1871); Whitridge *v.* Barry, 42 Md. 140 (1874); Newcomb *v.* Mutual Co., 8 Ins. L. J. 124 (1880; under Massachusetts statute); Scobey *v.* Waters, 10 Lea (Tenn.), 551, 556 (1882; where, however, assignment by *infant* beneficiary was held invalid); Ford *v.* Travelers' Co., 6 Mackey (D. C.), 384 (1888; under Connecticut statute). See, however, Conn. Mutual Co. *v.* Burroughs, 34 Conn. 305 (1867). See also, as to effect of New York statutes, Robinson *v.* Mutual Benefit Co., 16 Blatchf. 194 (1879). See O'Mara *v.* Nugent, 37 N. J. Eq. 326 (1883). Assignment held valid, whether with reference to law of Connecticut or of New Jersey. Conn. Mutual Co. *v.* Westervelt, 52 Conn. 586, 593 (1879). See under Georgia statute, Smith *v.* Head, 75 Ga. 755 (1885). Under the Massachusetts statute, taking out a policy for the benefit of the wife and children of insured, constitutes an executed voluntary settlement, irrevocable by him. Gould *v.* Emerson, 99 Mass. 154 (1868; where insured attempted to revoke by will); Unity Mutual Assoc. *v.* Dugan, 118 Mass. 219 (1875). And such a policy was held not assignable by his wife, so as to prejudice the rights of children who were beneficiaries. Knickerbocker Co. *v.* Weitz, 99 Mass. 157 (1868; holding such to be effect whether New York or Massachusetts statute governed). Gould *v.* Emerson was followed under the New Hampshire statute, which was essentially the same as that in Massachusetts. Stokell *v.* Kimball, 59 N. H. 13 (1879). Under the Tennessee statute respecting policies for benefit of the widow and heirs, a policy payable to the heirs of insured, held to create a vested, irrevocable interest. Gosling *v.* Caldwell, 1 Lea (Tenn.), 454 (1878). So policy payable to his wife and children. Scobey *v.* Waters, 10 Id. 551, 555 (1882). See Rison *v.* Wilkerson, 3 Sneed, 567 (1856); Williams *v.* Carson, 2 Tenn. Ch. 269; 9 Baxter, 516 (1876).

The hardship frequently produced by the workings of the New York statutes, as construed by the decisions, has led to some modification of their effect by later legislation. By L. 1873, c. 821, provision is made for surrendering a policy in favor of a married woman, or of her and her children, also, if she has no children or issue thereof,

for disposing of such policy by will or deed. As to necessity for compliance with this provision, see Bloomingdale *v.* Lisberger, 24 Hun, 355 (1881); Frank *v.* Mutual Co., 102 N. Y. 266, 272 (1886; holding that an invalid assignment conferred no power to make a valid surrender); Whitehead *v.* N. Y. Co., 102 N. Y. 143 (1884; where, as against the children, a surrender obtained by the husband after the wife's death, on the false statement that he was acting as their guardian, was declared invalid). In Brick *v.* Campbell, 54 N. Y. Super. Ct. 305 (1887), the court refused to compel a reassignment of a policy assigned by a married woman, which assignment was invalid under the above statute, she having children at the time, who were, however, all dead when the action for reassignment was commenced. But this decision was reversed in 122 N. Y. 337 (1890). And by L. 1879, c. 248, the wife or her legal representatives may, with her husband's written consent, assign any policy issued within the State upon his life for her benefit and use, to any person, or may surrender to the insurer. Under this act the policy is assignable whether the wife have children or not, and the husband's assent is sufficiently shown by his joining with the wife in the assignment. Anderson *v.* Goldsmidt, 103 N. Y. 617 (1886). But this statute was held not to validate an assignment previously executed, in the absence of ratification by the assignor, mere continuance of possession of the policy by the assignee, being held insufficient. Brick *v.* Campbell (p. 348), above. Otherwise in case of ratification. Conn. Mutual Co. *v.* Van Campen, 11 N. Y. Suppl. 103 (1890).

§ 79. **As to evidence that contract is such as to be within protection of statute.**—Under the New York statutes, it has been held that the policy need not refer to the act of 1840, in order to be brought within its provisions. De Jonge *v.* Goldsmith, 46 N. Y. Super. Ct. 131 (1880). Thus, the omission to provide in the policy for the disposition of the fund in case of death of the wife before that of her husband, was held not to prevent the application of this rule, nor did a statement on the application that the insurance was for her benefit solely. Brummer *v.* Cohn, 86 N. Y. 11, 14 (1881); approved in Brick *v.* Campbell (p. 344), above. Nor

is proof that none of the premiums were paid by the husband, conclusive evidence that the policy is not within the act of 1840. Frank *v.* Mutual Co., 12 Daly, 267 (1884); affirmed on this point in 102 N. Y. 266, 272 (1886). Nor does the fact that the annual premiums exceed the $500 limit fixed by L. 1870, c. 227. Id. Whether extrinsic parol evidence is admissible to overcome the presumption that a policy was issued under the act of 1840, was regarded as doubtful, in De Jonge *v.* Goldsmith, above; Brummer *v.* Cohn, above. Under the Alabama statute, a policy was held within the statute, though procured at the instance of the husband, the wife having no agency in procuring it. Felrath *v.* Schonfield, 76 Ala. 199 (1884). Though a policy nowhere expressed to be for the benefit of the wife, or to have been taken out for her, or on her account, was held not within the protection of the Missouri statute. Conn. Mutual Co. *v.* Ryan, 8 Mo. App. 535 (1880). See, as to evidence as to policy being within English statute, Holt *v.* Everall, 2 L. R. Ch. D. 226 (1876).

§ 80. Effect of payment or non-payment of premiums.—The right of the assignee has been held not strengthened by his paying premiums in good faith after the assignment, his sole right being confined to a claim that he might make for the amount of premiums paid by him. De Jonge *v.* Goldsmith, 46 N. Y. Super. Ct. 131; affirmed, it seems, in 86 N. Y. 614 (1881). See also, Frank *v.* Mutual Co., 102 N. Y. 266, 280 (1886). And see §§ 85, 127. So, where the assignee had taken out new policies upon collusively surrendering the original, his right was held not strengthened by the fact of his having allowed the original policies to lapse for non-payment of the premiums. Barry *v.* Brune, 71 N. Y. 261 (1877). And where the assignee, having, as a consideration of the transfer, agreed to keep the policy alive, afterward allowed it to lapse, he was held liable to the wife in damages, though her husband was still living, that circumstance affecting the measure of damages only. Ainsworth *v.* Backus, 5 Hun, 414 (1875). But in case of a policy obtained by a husband on his life *before marriage*, and assigned by him to his wife after marriage, he was held under no obligation to keep it alive, and the wife was held

to have no rights in a new policy taken out by him after the old one had lapsed for non-payment of premiums, such new policy not being payable to her or for her use. Britton *v.* Mutual Co., 12 Daly, 164 (1883).

§ **81. Effect of claims of creditors.**—As to the *common law* rights of creditors, see § 77. Under the New York statutes referred to, the policy is not subject to the claims of the wife's creditors. Baron *v.* Brummer, 100 N. Y. 372 (1885; where, however, it was left undecided, whether, after payment of the amount due on the policy, and its investment in other property, it can be reached by creditors); Austin *v.* McLaurin, 16 N. Y. State Reporter, 806 (1888; holding that the proceeds of a policy could not be taken for a debt of a widow contracted before the husband's death). But under the Massachusetts statute, the wife's interest has been held subject to the claims of her creditors. Norris *v.* Mass. Mutual Co., 131 Mass. 294 (1881); Troy *v.* Sargent, 132 Mass. 408 (1882). But held otherwise under the statute, in case of a benefit society. Saunders *v.* Robinson, 144 Mass. 306 (1887). Compare Smith *v.* Bullard, 61 N. H. 381 (1881). As to validity of policy taken out by an insolvent debtor for the benefit of his wife and children, a creditor paying the premiums, see Bonnell *v.* Graham, 16 N. Y. Weekly Digest, 216 (1883). Under the Tennessee statute, insurance for benefit of wife of insured, held exempt from claims of existing creditors, though effected while insured was insolvent, and though the premiums paid exceeded the amount of the debt. Harvey *v.* Harrison, 14 Southwestern Rep. 1083 (Supm. Ct. Tenn. 1891). See also, § 77 and cases cited in notes. As to effect of provision in New York statute, limiting exemption in favor of wife as against her husband's creditors, to case where annual premium does not exceed $500, see Baron *v.* Brummer, 100 N. Y. 372 (1885); Masten *v.* Amerman, 20 Abb. N. C. 443 (1888; where a receiver was allowed to maintain an action to secure the benefit of such excess for the husband's creditors); Stokes *v.* Amerman, 121 N. Y. 337 (1890; where a creditor's action to ascertain and declare the rights of the creditor, was allowed to be maintained, prior to the policy becoming due). Under

the Alabama statute, the creditors were held entitled to the excess over insurance, to the extent of $500, the amount specified, without regard to the number of policies by which the insurance was effected. Stone *v.* Knickerbocker Co., 52 Ala. 589 (1875); also held that the insolvency or solvency of the husband at the time of the contract, does not affect its validity, but that a policy in favor of one only of several children, was not within the letter or spirit of the statute. Fearn *v.* Ward, 65 Ala. 33 (1880). See further decision in 80 Ala. 555 (1886). Under the Missouri statute limiting the exemption to case of premium not exceeding $300, the restriction was held not to apply to a husband in *solvent* circumstances. Hence, in a creditor's suit, where it appeared that the annual premiums exceeded $300, and part were paid by the husband while solvent, and part while insolvent, held that the proceeds should be distributed between his widow and the creditors, in the proportion that the premiums paid by him while solvent, bore to those paid after his insolvency. Pullis *v.* Robison, 73 Mo. 201 (1880). Compare Charter Oak Co. *v.* Brant, 47 Mo. 419 (1871). Under the Missouri statute, contract held not void because the annual premiums exceeded the limit of $300 (corresponding to the New York limit of $500). Smith *v.* Missouri Valley Co., 4 Dillon, 353 (1876).

§ 82. **Mode of taking advantage of invalidity of assignment.**—Under the New York statutes, the wife may avoid her own invalid assignment, though, if the policy has, since the assignment, lapsed for non-payment of premiums, she obtains no right of action on the policy. Frank *v.* Mutual Co., 102 N. Y. 266, 275 (1886; where her right to recover against the assignee or the company for conversion of the policy, was, under the circumstances, denied, but she was allowed to recover from the assignee the amount received by him from the company, less the premiums paid, with interest). And her delay in electing to avoid such assignment, was held not to forfeit her right to do so, where her claim was not barred by the statute of limitations. Id. But the right to avoid such assignment made by the wife, is a personal one. Smillie *v.* Quinn, 90 N. Y. 492 (1882; where it was held that her creditors had no such right); Conn.

Mutual Co. *v.* Van Campen, 11 N. Y. Suppl. 103 (1890). Nor does payment to the pretended assignee discharge the insurer. Leonard *v.* Clinton, 26 Hun, 288, 291 (1882). As to whether creditors might avoid an assignment of a policy on which the premiums are paid by the wife alone, see Frank *v.* Mutual Co., 102 N. Y. 266, 274 (1886). But in case of a policy on the husband's life, issued originally payable to his representatives (and afterward assigned to her under L. 1860, c. 90), the rule in Smillie *v.* Quinn does not apply, and her assignment of such policy is open to attack by creditors, to whose claims the policy is subject to the extent of its surrender value at the time of assignment. Leonard *v.* Clinton, 26 Hun, 288, 291 (1882). As a condition of decreeing restitution to a wife of a policy that she had assigned, restoration of the money received by her for the assignment was required. Wilson *v.* Lawrence, 8 Hun, 593, 597 (1876). Though, where the assignment was to secure a debt owing by the husband, the wife was not, as a condition of repudiating the assignment, required to restore to the assignee what he had paid out relying on the assignment. Brick *v.* Campbell, 122 N. Y. 337, 348 (1890). So a wife was not allowed to repudiate a surrender of the policy to the company, she having failed to pay or tender the premiums as they became due. Attorney-General *v.* Guardian Mutual Co., 14 N. Y. Weekly Digest, 328; affirmed, it seems, without opinion, in 91 N. Y. 655 (1883). So, in case of an assignment void for infancy of the assignor, the assignee was held entitled to an equitable charge on the fund for premiums paid, with interest. Scobey *v.* Waters, 10 Lea (Tenn.), 551, 563 (1882). So, it seems, under the New York statutes, in case of invalid assignment by wife. Brick *v.* Campbell, above. And see § 127. Under the Massachusetts statute, the assignee was allowed to recover on the policy, on the ground that he had the legal title, though he would hold the proceeds subject to the equitable right of the wife or child. Burroughs *v.* State Mutual Co., 97 Mass. 359 (1867). But where the assignment was void by an express provision of the contract, and the wife and children were not named in it as beneficiaries, the administrator of the estate of the insured was held entitled

to recover the proceeds, to be held in trust. Unity Mutual Assoc. *v.* Dugan, 118 Mass. 219 (1875). See § 121. The assignee of policies assigned in contravention of the rights of a wife, was, in an equitable action to determine conflicting claims to the policies, enjoined from enforcing a foreign judgment obtained against the insurer in a suit to which the wife was not a party. Barry *v.* Brune, 8 Hun, 395; affirmed in 71 N. Y. 261 (1877). See Barry *v.* Mutual Co., 53 N. Y. 536 (1873).

CHAPTER V.

PREMIUMS AND ASSESSMENTS.

§ 83. Definition and general nature of premiums and assessments.—As has already been frequently stated or implied, performance by the insurer is commonly conditioned on a payment or payments to be made by the insured or some other person, and usually in money. It is unfortunate that there exists no term generally accepted as suffi-

ciently comprehensive to apply to all payments so made. As it is, such a payment is, in case of mutual benefit insurance, commonly known as an *assessment*, while, in case of other insurance, it is known as a *premium*. Ordinarily, at least, there exists no independent obligation to pay a premium, that is to say, the obligation (such as it is) to pay a premium cannot be enforced by action or otherwise,[1] such payment being merely a condition of the creation or preservation of the liability of the insurer. But of course an independent obligation to pay the premium may be created by agreement, and the peculiar nature of mutual benefit societies is such, that there commonly exists an independent obligation to pay the assessment, which obligation the insurer may enforce, usually by action.[2] Usually too, the contract prescribes the method of making such assessments, and by its terms adherence to this method is a condition precedent to liability to pay them,[3] the burden

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[1] Hence an unpaid premium was held not an "indebtedness," within the meaning of a statute providing for the deduction of "any indebtedness to the company," in determining the net value of a policy. Goodwin *v.* Mass. Mutual Co., 73 N. Y. 480, 486 (1878). "The theory that the premium, as it becomes due, is a *debt*, is a fallacious one, and leads to erroneous conclusions. It resembles a debt only in that it is a payment of money. A debtor is under obligation to pay; here no obligation exists. The payment of a debt may be compelled; payment of the premium is entirely optional with him who is to pay." Worthington *v.* Charter Oak Co., 41 Conn. 372, 416 (1874).

[2] But the provisions of a contract of benefit insurance, held such as to leave payment of assessments optional with the insured. New Era Assoc. *v.* Dare, 6 Pa. Co. 526 (1887). As to evidence in action against member for assessment, see New Era Assoc. *v.* Rossiter, 132 Pa. St. 314 (1890).

[3] As to validity of the assessment, see Passenger Conductors' Co. *v.* Birnbaum, 116 Pa. St. 565 (1887). Evidence of regularity of assessment, held insufficient to establish forfeiture for non-payment. Bates *v.* Detroit Assoc., 51 Mich. 587 (1883); Underwood *v.* Iowa Legion of Honor, 66 Iowa, 134 (1885); Agnew *v.* A. O. U. W., 17 Mo. App. 254 (1885); Rowswell *v.* Equitable Aid Union, 13 Fed. Rep. 840 (1882).

of proving that such method was adhered to, being accordingly on the insurer, whenever such non-payment is set up as a defense.[1] But, notwithstanding numerous special differences between premiums and assessments, to be hereafter pointed out, their general nature is the same, and for convenience we shall commonly use the term *premium* as including both premiums and assessments, indicating, as the occasion may arise, the special application of the rules laid down, to assessments as distinguished from premiums.

§ 84. **Paid-up insurance.**—Although the contract of insurance ordinarily contemplates payment of premiums or assessments from time to time, until the happening of the event on which the liability of the insurer to pay becomes consummated, yet the contract or the course of dealings may be such, that the duty to pay such premiums or assessments ceases before the happening of such event. In other words, the contract becomes, so far as the duty of the insured to pay is concerned, "paid-up," or (where the contract is evidenced by a policy), the policy becomes a "paid-up policy." Although, by agreement between the parties, the policy may be made a paid-up policy at any time, whatever were the terms of the original contract,[2] yet it chiefly concerns us to consider the cases in which a policy becomes paid-up in pursuance of an agreement contained

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Such evidence held sufficient, in Crossman *v.* Mass. Benefit Assoc., 143 Mass. 435 (1887).

[1] American Mutual Aid Soc. *v.* Helburn, 85 Ky. 1 (1887; where allegation that certain assessments were "duly" made "in accordance with the charter," was held bad as merely an averment of a conclusion of law). The record of a benefit society held *prima facie* evidence of the truth of the facts therein stated, for the purpose of establishing the regularity of an assessment. Bagley *v.* Grand Lodge A. O. U. W., 131 Ill. 498, 503 (1889).

[2] In Riegel *v.* American Co. (see note 1, p. 151), the policy seems to have been issued in the absence of any previous agreement therefor.

in the original policy.[1] In the absence of provision to the contrary, such an agreement obviously contemplates that it be performed, if at all, while the original contract is still in force, or at least within a reasonable time thereafter.[2] But it is commonly provided that, after the contract has become void for non-performance of some condition by the insured,[3] usually payment of premiums,[4] there shall yet

[1] Specific performance of an agreement to issue a paid-up policy, decreed in Belt *v.* Brooklyn Co., 12 Mo. App. 100 (1882); Bruce *v.* Continental Co., 58 Vt. 253 (1885); Dutcher *v.* Brooklyn Co., 3 Dillon, 87 (1874); affirmed in 95 U. S. 269 (1877). So, though contained, not in the original policy, but in a pamphlet issued by the insurer, and containing representations on which the insured relied in entering into the contract. Southern Mutual Co. *v.* Montague, 84 Ky. 653 (1887). The right to maintain a suit for such specific performance, was declared in Standley *v.* Northwestern Mutual Co., 95 Ind. 254, 258 (1883), where, however, such right was held not available as a counterclaim in a foreclosure suit. As to effect of failure to issue paid-up policy, as defense to action on note, see Franklin Co *v.* Cardwell, 65 Ind. 138 (1879).

As to who has right of action for refusal to issue paid-up policy, where the beneficiary is another than the insured, see Knickerbocker Co. *v.* Heidel, 8 Lea (Tenn.), 488, 498 (1881). Such action held improperly brought in the name of the insured alone, without joining the beneficiaries, though the amount was payable to him should he live to a certain age. Watts *v.* Phœnix Mutual Co., 16 Blatchf. 228 (1879).

[2] So held in People *v.* Widows' & Orphans' Co., 15 Hun, 8 (1878); Smith *v.* National Co., 103 Pa. St. 177 (1883); Bussing *v.* Union Mutual Co., 34 Ohio St. 222 (1877). To the contrary, Winchell *v.* Hancock Mutual Co., 8 Reporter, 549 (1879). As to effect of provision, "this policy is non-forfeiting, if application for settlement is made while it is in force, and after three annual premiums have been paid," see Nashville Co. *v.* Mathews, 8 Lea (Tenn.), 499 (1881). Specific performance of an agreement to issue a policy, refused on ground of default in payment of premiums. Moses *v.* Brooklyn Co., 50 Ga. 196 (1873).

[3] Of course, granting the right to obtain a paid-up policy, notwithstanding violation of a condition specified, does not, necessarily at least, imply such right in case of violation of a condition of a different kind. Douglas *v.* Knickerbocker Co., 83 N. Y. 492, 503 (1881).

[4] In Massachusetts, provision is made by statute for paid-up insurance after default in payment of premiums, after two annual premiums have

remain to him the privilege of exchanging his policy for a paid-up policy,[1] and frequently it is also provided that the

been paid. L. 1887, c. 214, § 76. For decisions under preceding provisions to similar effect, see Pitt *v.* Berkshire Co., 100 Mass. 500 (1868); Bigelow *v.* State Mutual Assoc., 123 Mass. 113 (1877); Carter *v.* John Hancock Mutual Co., 127 Mass. 153 (1879); Holmes *v.* Charter Oak Co., 131 Mass. 64 (1881); Marston *v.* Mass. Co., 59 N. H. 92 (1879); Van Creelen *v.* Mass. Mutual Co., 35 La. Ann. 226 (1883); Sheifers *v.* Same, 46 Ohio St. 418 (1889). So in New York, after default in such payment, after a policy has been in force "three full years." L. 1879, c. 347. See also, § 111. A provision for issuing a paid-up policy, *in case of default* in payment of premiums, held to confer the right on the insured to obtain such policy *at any time*, though not in such default. Lovell *v.* St. Louis Mutual Co., 111 U. S. 264 (1884). The conduct of the agent of the insurer, held such as to estop the insurer to assert the invalidity of a claim for a paid-up policy under an alleged agreement therefor. Piedmont & Arlington Co. *v.* Young, 58 Ala. 476 (1877). See also, as to effect of provision for paid-up policy on default in payment of premiums, Knapp *v.* Homeopathic Mutual Co., 117 U. S. 411 (1886); Mound City Mutual Co. *v.* Huth, 49 Ala. 529 (1873); Mound City Mutual Co. *v.* Twining, 19 Kans. 349 (1877); Bruce *v.* Continental Co., 58 Vt. 153 (1885).

[1] Equitable relief against the surrender of a policy for a paid-up policy, was sought on the ground that the insured was dead at the time of the surrender, but was refused on the ground that it appeared that the parties treated on the basis that it was doubtful whether or not he was dead. Riegel *v.* American Co., 7 Pa. Co. 445 (1889). Held that the insurer could not, as a condition of issuing a paid-up policy, require a written surrender of the original policy from one having no beneficial interest therein, and to whom the insurer could in no way become liable thereon. White *v.* Penn Mutual Co., 6 Mo. App. 587 (1878-9). Where a policy for $10,000 was "renewed and continued in force for the commuted amount of $3,000 until August 16, 1871," the limitation as to time was held unavailing, the original policy having, by the acceptance of interest in arrears, been reinstated to continue in force as a paid-up policy during the life of the insured. St. Louis Mutual Co. *v.* Grigsby, 10 Bush (Ky.), 310 (1874). A condition contained in a paid-up policy, imposing a new ground of forfeiture, *i.e.*, the non-payment of interest on premium notes, such condition not being contained in or authorized by the original policy, held not binding on insured, in absence of proof that he accepted the paid-up policy with notice of the new provision. Cole *v.* Knickerbocker Co., 63 How. Pr. 442 (1882), distinguishing Attorney-

application for such paid-up policy must be made within a specified time.[1] The amount for which such paid-up policy

General *v.* North America Co., 82 N. Y. 172, 191 (1880); Thompson *v.* Knickerbocker Co., 104 U. S. 252 (1881), as cases where the original agreement authorized such a condition. As to a paid-up policy not being subject to the conditions of the original one, see Cotton States Co. *v.* Edwards, 74 Ga. 220, 229 (1884). It was held so subject in Merritt *v.* Cotton States Co., 55 Ga. 103, 110 (1875). As to a paid-up policy being a continuance of the original one, with reference to the liability of stockholders of the insuring company, see McDonnell *v.* Alabama Gold Co., 85 Ala. 401 (1888).

[1] Specific performance refused on the ground of non-compliance with such a condition. Hanthorne *v.* Brooklyn Co., 5 Mo. App. 73 (1878). A provision for issuing such a policy within a certain time after "an accrued premium was due," held to refer to an accrued premiums *for the non-payment of which the insurer could determine the contract.* Michigan Mutual Co. *v.* Bowes, 42 Mich. 19 (1879). Compare § 94. A provision for giving such time, in case of default in payment of premium, was held not nullified by a general provision for forfeiture for default in payment of premiums. Holly *v.* Metropolitan Co., 17 N. Y. Weekly Digest, 342 (1883). The assignees of the contract were, on application within the specified time, though after the death of the insured, held entitled to recover the amount for which such policy would have been issued. Wheeler *v.* Conn. Mutual Co., 82 N. Y. 543, 553 (1880). So the administrator of the insured was allowed to recover such amount. Dorr *v.* Phœnix Mutual Co., 67 Me. 438 (1877). In Universal Co. *v.* Whitehead, 58 Miss. 226 (1880), specific performance of the agreement to issue the policy, was refused on the ground of failure to transmit the original policy to the insurer within the time specified. So held, notwithstanding that during such time the insurer was enjoined from *issuing* any policies. But a suit for specific performance against the same company, under the same agreement, was held maintainable on the ground of acts of the company constituting an estoppel. Coffey *v.* Universal Co., 7 Fed. Rep. 301 (1881). Compare Hudson *v.* Knickerbocker Co., 28 N. J. Eq. 167 (1877). Somewhat questionable is the decision in Chase *v.* Phœnix Mutual Co., 67 Me. 85 (1877), where the right of the insured, under an agreement to issue a paid-up policy, to recover a sum proportionate to premiums paid, was sustained, notwithstanding his failure to perform the conditions precedent of surrendering the original policy within the time specified. Here, however, the policy was endorsed "non-forfeiting." And the same effect was given to the same provision in an action by the beneficiary. Montgomery *v.* Phœnix

is to be issued, where the amount is not determined by the contract, would seem to be the value of the original policy, which may be readily calculated, having in view the age of the insured, and any other circumstances proper to be considered in this connection.[1] Sometimes, however, the amount is determined by the contract, as, for instance, that it shall be for the amount of premiums already paid.[2]

Mutual Co., 14 Bush (Ky.), 51 (1878). This was a case of an endowment policy, but the same rule was applied to an ordinary policy containing substantially the same provision. Southern Mutual Co. *v.* Montague, 84 Ky. 652 (1887).* To same effect, Sheerer *v.* Manhattan Co., 16 Fed. Rep. 720 (1883), which was, however, overruled in a further decision in the same case in 20 Fed. Rep. 886 (1884).

[1] Thus, under an agreement to issue the policy for an equitable amount, it was held error to declare, as the measure of compensation, the full amount of premiums that had been paid. Farley *v.* Union Mutual Co., 41 Hun, 303 (1886); Union Central Co. *v.* McHugh, 7 Nebr. 66 (1878). In the latter case, the rule of damages was declared to be "the fair cash value of a new paid-up policy at the time of the breach of the contract." In the former, it was held to be determinable by considering the time the policy had run, the age of the insured, the amount of the annual premiums paid, and required to be paid, during the continuance of the policy, and the probable period of continuance; and see subsequent decision in 9 N. Y. State Reporter, 273 (1887), where Attorney-General *v.* Guardian Mutual Co., 82 N. Y. 336 (1880), was distinguished on the ground that there the company had failed, the insured was dead, a receiver had been appointed, and the policies were in full force when the insured died. In Nashville Co. *v.* Mathews, 8 Lea (Tenn.), 499 (1881), the rule that the measure of damages for breach of an agreement to issue a paid-up policy, is the full amount of premiums paid, was rejected, and the measure was held to be a proportionate part of the reserved fund, that is to say, the fund created by reserving a portion of the premiums, after deducting that portion appropriated to paying expenses, and compensating the insurer for the risk. Nominal damages only, held recoverable in absence of other proof of damage than amount of premiums paid. Watts *v.* Phœnix Mutual Co., 16 Blatchf. 228 (1879).

[2] In Phœnix Mutual Co. *v.* Baker, 85 Ill. 410 (1877), the damages for breach of a contract to issue a paid-up policy "for the whole amount of even dollars of premiums received by the company," was held to be, not the whole amount of premiums that had been received, but the value

§ 85. **Payment, by whom to be made.**—The insured, or other person who enters into the contract with the insurer, is, of course, the person on whom primarily rests the obligation to pay the premiums.[1] And, of course, the performance of this duty may be delegated, or, by agreement, an obligation to pay may rest upon one not a party to the original contract of insurance.[2] And it is clear that recov-

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of the paid-up policy. What was, however, the measure of such value was left undetermined. So, in an action for breach of an agreement to issue, after default in payment of premiums, "a paid-up policy for a sum equal to the full amount of the ordinary annual premiums paid at the time of default," the measure of damages was held to be what would be sufficient to purchase just such a policy as was stipulated, in a good and responsible company, and, in the absence of proof of damages, only nominal damages were allowed. Missouri Valley Co. *v.* Kelso, 16 Kans. 481 (1876). In Mound City Co. *v.* Twining, 12 Kans. 475 (1874), the contract provided that the paid-up policy should be issued "for the amount which could be bought by the net value of" the original policy (the value to be determined on the basis and assumptions contained in a statute referred to), considered as a gross single premium, according to the single premium rates of the insurer. Recovery was allowed accordingly. A provision giving the insured, after payment of two annual premiums, the option to "receive a paid-up policy for the full amount of premium paid," held, in the absence of any words of restriction, to entitle the insured to a paid-up policy for the aggregate amount, though it exceeded the amount of original insurance. Christy *v.* Homeopathic Co., 93 N. Y. 345 (1883). A contract construed as an agreement to issue a paid-up policy for as much cash as the insurer had received from the insured, less the odd sum over hundreds of dollars. Hughes *v.* Piedmont & Arlington Co., 55 Ga. 111 (1875; specific performance decreed). See Knickerbocker Co. *v.* Heidel, 8 Lea (Tenn.), 488, 496 (1881).

[1] An allegation that *insured* "did not not pay the assessments," held sufficient, there being no need of alleging generally that they were paid by no one. Gray *v.* Supreme Lodge Knights of Honor, 118 Ind. 293, 298 (1888).

As to effect of payment of entire premium by one of several interested in policy, see Parker *v.* Marquis of Anglesea, 25 L. T. R. 482 (1871).

[2] See Worden *v.* Guardian Mutual Co., 39 N. Y. Super. Ct. 317, 329 (1875). In case of an assessment *made* before the death of the insured,

ery may be had for premiums paid for another *at his request.*[1] But the question that calls for especial consideration in this connection, is as to the effect of payment by one acting without authority from the insured, or other person on whom the obligation primarily rests; in other words, payment by a stranger to the contract. So far as

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but not *payable* till after, forfeiture was held prevented by tender made by *the beneficiary*, *after* the death of the insured. Bankers' & Merchants' Assoc. *v.* Stapp, 77 Tex. 517, 526 (1890). But *query*, as to necessity of such tender. As to liability of debtor for breach of covenant to pay premiums on policy issued on his life for benefit of creditor, see Browne *v.* Price, 4 C. B. N. S. 598 (1858); North British Co. *v.* Riky, 2 Exch. 687 (1848); National Assoc. *v.* Best, 2 Hurlst & N. 605 (1857); Barber *v.* Butcher, 15 L. J. Q. B. 289 (1846); Mitcalfe *v.* Hanson, 35 L. J. Q. B. 225 (1866); *Ex parte* Bank of Ireland, 17 L. R. (Irish), 507 (1886). As to effect of covenant of mortgagor of policy to pay premiums, see *Re* Killen, 15 L. R. (Irish), 388 (1885); Deering *v.* Bank of Ireland, 17 Id. 594 (1886).

A covenant to pay premiums for another, having become impossible, by the company having been wound up, held that the covenantee had no equity to maintain a suit that the amount of the premiums might in future be paid to him. Garniss *v.* Heinke, 40 L. J. Ch. 306 (1871). See also, as to damages for breach of covenant in marriage settlement to pay premiums on policy on husband's life, Matter of Miller, 6 L. R. Ch. D. 790 (1877). Compare, as to liability for breach of covenant to keep policy on foot, Dormay *v.* Borrodaile, 10 Beavan, 335 (1847); Bridger *v.* Deane, 42 L. R. Ch. D. 9 (1889).

As to agreement by which an association was to pay premiums on policy on life of one of its members, see Teutonia Co. *v.* Mueller, 77 Ill. 22 (1875); Teutonia Co. *v.* Anderson, Id. 384 (1875). As to agreement by which railroad corporation was to pay assessments for benefit of employe, see Lyon *v.* Travelers' Co., 55 Mich. 141 (1884); McMahon *v.* Travelers' Co., 77 Iowa, 229 (1889); Bane *v.* Travelers' Co., 85 Ky. 677 (1887). As to agreement by which subordinate organization of benefit association is to pay assessments for benefit of member, to principal organization, see Schunck *v.* Gegenseitiger Fund, 44 Wis. 369 (1878); Borgraefe *v.* Supreme Lodge Knights of Honor, 22 Mo. App. 127 (1886).

[1] City Savings Bank *v.* Whittle, 63 N. H. 587 (1885). Compare Barron *v.* Fitzgerald, 6 Bingham, N. C. 201 (1840).

the rights of the insurer are concerned, the question presents little difficulty; for he clearly has the right to refuse to accept payment by a mere stranger, whereas, if he does accept such payment, he would be estopped to assert the invalidity of the payment. Nor does it seem that the rule should be otherwise, though the taking effect of the contract is made conditional on the payment of the premium in question.[1] But, although payment by a stranger may have the effect to cause the contract to take effect, or at least to keep alive an existing contract, as against the insurer, it by no means follows that it gives the stranger any rights as against the insured. It does not even give him a right of action for money paid for the benefit of the insured, and certainly there is no principle under which he can ordinarily be regarded as entitled to a lien on the amount of the insurance paid by the insurer under the contract.[2] Yet special circumstances may exist entitling him

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[1] This view is not, however, sustained by the authorities. Thus, where such condition existed, payment by a third person without the knowledge of the applicant, though made during his life, held not to cause the contract to take effect, though ratified by his administrator after his death. Whiting *v.* Mass. Co., 129 Mass. 240 (1880); Piedmont & Arlington Co. *v.* Ewing, 92 U. S. 377 (1875). To the contrary, however, Whitley *v.* Piedmont & Arlington Co., 71 N. C. 480 (1874). So, where the premium was tendered after the death of the applicant, the contract was held not to thereby take effect. Giddings *v.* Northwestern Mutual Co., 102 U. S. 108 (1880). But, of course, a clear distinction can be drawn between payment *before* and payment *after* his death.

[2] Lockwood *v.* Bishop, 51 How. Pr. 221, 226 (1876); Meier *v.* Meier, 15 Mo. App. 68 (1884); affirmed in 88 Mo. 566 (1886); Falcke *v.* Scottish Imperial Co., 34 L. R. Ch. D. 234 (1886; where the owner of the equity of redemption in a policy, was held to obtain by such payment, no lien as against the mortgagee); Strutt *v.* Tippett, 61 L. T. R. 460 (1889; merely having an interest in the contract being kept alive, held insufficient). See also, National Mutual Aid Assoc. *v.* Lupold, 101 Pa. St. 111 (1882). A tenant for life of property that included a policy, held not entitled to reimbursement for premiums. Matter of Waugh's Trusts, 46 L. J. Ch. 629 (1877). So one held not entitled to be repaid

to such a lien. Perhaps, however, such circumstances create an exception more apparent than real; that is to say, payment in such case is not, strictly speaking, to be regarded as made by a stranger to the contract, but as made under an express or implied authority from the person on whom the duty to pay primarily rests. As, however, the limits of the application of the rule allowing such a lien to be created under special circumstances, are yet to be clearly defined by the decisions, it may be sufficient, for present purposes, to state the rule as it has been laid down by high authority. The cases in which the lien may be created are declared to be;[1] "(1). By contract with a beneficial owner of the policy.[2] (2). By reason of the right of trustees to

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premiums paid for his own benefit in a transaction judicially declared to be improper. Fry *v.* Lane, 40 L. R. Ch. D. 312, 325 (1888).

[1] This is the rule as stated by Fry, J., in Leslie *v.* French, 23 L. R. Ch. D. 552, 560 (1883), and approved and adopted in Earl of Winchilsea's Policy Trusts, below; Strutt *v.* Tippett, above.

[2] Under this exception are sustainable most, if not all, of the following cases: Where a mortgagor had contracted to pay premiums on a policy forming part of the security for the mortgage debt, and the sureties for such payment had been compelled to pay, they were held entitled to a lien. Aylwin *v.* Witty, 30 L. J. Ch. 860 (1861). So, where a wife out of her separate income paid the premium on certain policies that, by a settlement made previously to her marriage, were assigned as collateral security for a provision settled upon her under that instrument by the covenant of her husband, she was held entitled to a lien. Burridge *v.* Row, 1 Younge & Collyer (Ch.), 183 (1842). In case of the assignment of a merely contingent interest, where the interest was defeated by the happening of the contingency, the assignee was held entitled to reimbursement out of the fund, for premiums paid. Conn. Mutual Co. *v.* Burroughs, 34 Conn. 305 (1867). Where a third person paid premiums under an agreement with the insurer for reimbursement from the amount collected on the contract, and afterwards collected it as guardian for the beneficiary, he was, in a suit in equity brought for the purpose, declared entitled to retain a reasonable amount for reimbursement. Hodge *v.* Ellis, 76 Ga. 272 (1886). The validity (as against creditors) of an agreement whereby, on forfeiture for non-payment of premiums, a creditor of the insured agreed to pay the premiums, and be

an indemnity out of their trust property for money expended by them in its preservation.[1] (3). By subrogation to this right of trustees, of some person who may at their request have advanced money for the preservation of the property. (4). By reason of the right vested in mortgagees or other persons having a charge upon the policy, to add to their charge any moneys which have been paid by them to preserve the property."[2]

§ 86. **Time of payment.**—There is no inherent reason why payment of the premium should not be made in one sum, once for all. But commonly the payment is made from time to time and at stated intervals,[3] as annually or

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reimbursed out of the proceeds of the policy, sustained. Bonnell *v.* Graham, 16 N. Y. Weekly Digest, 216 (1883).

Under this head, perhaps, belong the cases where one having collected the insurance money under color of a right (as, for instance, an assignment void for want of insurable interest, or a transfer in contravention of the rights of the beneficiary), has been held entitled to retain for premiums or assessments paid. See § 127.

[1] The assignee in bankruptcy of the insured, held entitled as against the beneficiary to such reimbursement "out of the policy when it shall have been paid." Matter of Bear, 11 Nat. Bankr. Reg. 46. But a trustee of *another fund* than the insurance money, was held not entitled to a lien on such money for amount of premiums paid. Earl of Winchilsea's Policy Trusts, 39 L. R. Ch. Div. 168 (1888). Norris *v.* Caledonian Co., 38 L. J. Ch. 721 (1869), seems sustainable as a case of payment by a trustee of the insurance moneys.

[2] Mortgagees of the policy, whose title was good only after the death of tenant for life, held entitled to reimbursement for premiums paid during the life tenancy, the trustees and others interested, refusing to pay them. Gill *v.* Downing, 17 L. R. Eq. 316 (1874).

[3] If the day for the payment falls on Sunday, the premium is not payable till Monday. Hammond *v.* American Mutual Co., 10 Gray (Mass.), 306 (1858). But held otherwise of payment falling due on Thanksgiving Day. National Mutual Benefit Assoc. *v.* Miller, 85 Ky. 88 (1887).

As to effect of testamentary provision for payment of premiums, as

quarterly.[1] In case of mutual benefit insurance, however, it is customary, on the happening of the loss or injury insured against, to call upon the other persons insured (or a prescribed portion of them), for assessments, for the immediate purpose of making payment on account of such loss or injury. Hence, necessarily, the assessments are payable, not at stated intervals, but at irregular intervals.

§ 87. **Duty of insurer to give notice of time of payment.**—If, by the terms of the contract, the insured agrees to pay the premiums at times fixed, there is, generally speaking, no duty resting on the insurer to give the insured previous notice of the time of such payment. Yet it is clear that the agreement may be such as to impose such duty on the insurer. Not only may such agreement be express, but it may be implied from other provisions of the contract, or from the course of dealing between the parties. But such agreement to give notice, is subject to the general rule by which a written contract supersedes prior or contemporaneous negotiations, that is to say, if the written contract provides, without qualification, that the premium shall be paid at a time fixed, an agreement imposing on the insurer the duty to give previous notice of such time, must have been entered into subsequently to the written contract.[2] The question of the sufficiency of the

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violation of provision against perpetuities, see Cathcart *v.* Heneage, 10 Scotch Session Cases, 4th series, 1205 (1883).

[1] As to effect of a peculiarly worded policy, providing for the payment of an "annual premium payable by quarterly instalments," see Phœnix Co. *v.* Sheridan, 8 House of Lords Cases, 745 (1860).

[2] Thus an expectation of notice, held out before or at the time the insurance was effected, held insufficient to create an obligation to give notice. (Union Mutual) Co. *v.* Mowry, 96 U. S. 544 (1877). And see Morey *v.* N. Y. Co., 2 Woods, 663 (1873); Coombs *v.* Charter Oak Co., 65 Mo. 382 (1876); Mobile Co. *v.* Pruett, 74 Ala. 487, 497 (1883). But to the contrary, True *v.* Bankers' Assoc., 47 Northwestern Rep. 520 (Supm. Ct. Wis. 1890).

evidence of the agreement to give notice, whether or not contained in the original contract, must necessarily be determined with reference to the circumstances of each case.[1] It is, however, difficult to see any sound basis for the proposition that the mere *usage* of giving such notice, should in any case be sufficient to constitute an *agreement* to give such notice, in other words, to operate as a waiver of prompt payment, in default of such notice. For such usage in no way contemplates as the time of payment, a time later than that fixed by the contract, but, on the contrary, rather indicates, by way of re-affirmance of the original agreement, that the time shall be exactly as fixed. It is, in short, a mere *reminder* of the obligation of the insured, in no sense a *waiver* of it.[2] But though,

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[1] See Meyer *v.* Knickerbocker Co., 73 N. Y. 516 (1878); Attorney General *v.* Continental Co., 33 Hun, 138 (1884); Leslie *v.* Knickerbocker Co., 63 N. Y. 27 (1875); Selvage *v.* John Hancock Mutual Co., 12 Fed. Rep. 603 (1882). Thus, the evidence was held sufficient to show an agreement to give notice of the amount of the premium, where by the contract the premium was subject to a deduction equal to the amount of dividends to which insured was entitled. Phœnix Co. *v.* Doster, 106 U. S. 30 (1882); Home Co. *v.* Pierce, 75 Ill. 426, 431 (1874); Eddy *v.* Phœnix Mutual Co., 18 Atlantic Rep. 86 (Supm. Ct. N. H. 1889). S. P., where the insured never tendered the premium. Manhattan Co. *v.* Smith, 44 Ohio St. 156 (1886). But a forfeiture held not excused by fact of the notice containing an unintentional mistake as to amount, where it did not mislead insured. Lewis *v.* Phœnix Mutual Co., 44 Conn. 72, 90 (1876). Held not necessary that the failure to give notice be fraudulent, in order to operate as a waiver. Briggs *v.* National Co., 11 Fed. Rep. 458 (1882).

[2] That a mere usage of giving notice of the day of payment, is insufficient as a waiver of prompt payment, was held in Thompson *v.* (Knickerbocker) Co., 104 U. S. 252, 258 (1881; premium note); Smith *v.* National Co., 103 Pa. St. 177, 185 (1883); Gaterman *v.* American Co., 1 Mo. App. 300 (1876). But to the contrary are Union Central Co. *v.* Pottker, 33 Ohio St. 459, 463 (1878); Mayer *v.* Mutual Co. of Chicago, 38 Iowa, 304, 309 (1874); Goedecke *v.* Metropolitan Co., 30 Mo. App. 601 (1888; custom of benefit society to send collecting agent, held waiver, notwithstanding provision in contract that neglect

in the absence of agreement, there rests on the insurer no duty to give such notice, the apparent hardship of this rule has led, in some instances, to the enactment of statutes requiring notice to be given, in order to produce a forfeiture;[1] though even the benefit of such a statute, may, it would seem, be waived by express agreement to that effect.[2]

§ 88. **The same; assessments.**—The rules just stated as applicable to *premiums*, payable at regular intervals, are largely inapplicable to *assessments*, payable, as we have seen, at irregular intervals. In such case, notice of the time of payment is almost necessary from the very nature of the case, and, indeed, such notice and the manner of giv-

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of collector to call would not be deemed excuse for non-payment). And see Helme *v.* Philadelphia Co., 61 Pa. St. 107 (1869). But see Manhattan Co. *v.* Smith, 44 Ohio St. 156, 166 (1886). And want of notice will not excuse failure to pay within a reasonable time. Grant *v.* Alabama Gold Co., 76 Ga. 575 (1886; six months' delay held unreasonable).

[1] By statute in New York, 30 days' notice must be given in a manner prescribed, in order to produce forfeiture for non-payment of premiums. L. 1876, c. 341, as amended by L. 1877, c. 321. (As to policies issued on monthly or weekly installments of premiums, see L. 1885, c. 328.) Cases arising under this statute are Wyman *v.* Phœnix Mutual Co., 54 Hun, 184 (1887); Phelan *v.* Northwestern Mutual Co., 113 N. Y. 147 (1889); Carter *v.* Brooklyn Co., 110 N. Y. 15 (1888; where payment of each annual premium was held to be a "renewal" under this statute); Cyrenius *v.* Mutual Co., 13 N. Y. State Reporter, 204 (1887); Baxter *v.* Brooklyn Co., 119 N. Y. 451 (1890; holding that in an action on the contract, the insurer cannot set up non-payment of a premium, unless it first show that it has given the statutory notice, and that the 30 days have elapsed).

[2] A statute provided that on the payment of the first premium, the contract should remain in force for a certain time for the full amount, "anything to the contrary notwithstanding." Held that the benefit of such statute might be waived by express agreement, as by the substitution of a non-forfeitable policy of a different character. Caffery *v.* John Hancock Mutual Co., 27 Fed. Rep. 25 (1886).

ing it, are commonly provided for by the contract.[1] The manner of giving notice necessarily varies so much, in ac-

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[1] Supreme Lodge Knights of Honor *v.* Johnson, 78 Ind. 110 (1881); Covenant Benefit Assoc. *v.* Spies, 114 Ill. 463 (1885); Scheufler *v.* Grand Lodge A. O. U. W., 47 Northwestern Rep. 799 (Supm. Ct. Minn. 1891). In Siebert *v.* Chosen Friends, 23 Mo. App. 268, 272 (1886), held that the notice must substantially follow, in its form and manner of service, the rules prescribed, and that mere knowledge by the insured of the assessment, derived from another source, is insufficient to produce a forfeiture. The question whether notice had been given, held, under the circumstances, for the jury. Jackson *v.* Northwestern Mutual Assoc., 47 Northwestern Rep. 733 (Supm. Ct. Wis. 1891). Evidence held sufficient to show waiver of provision that notice should be under corporate seal. Heffernan *v.* Supreme Council American Legion of Honor, 40 Mo. App. 605 (1890). Under the provisions of the contract, notice to the member himself, held requisite to produce forfeiture; notice to the subordinate organization of which he was a member, being insufficient. People *v.* Supreme Council Catholic Benev. Assoc., 10 N. Y. Suppl. 248 (1889). For cases where the notice was held insufficient to produce a forfeiture, see Miner *v.* Michigan Assoc., 63 Mich. 338 (1886); Mulroy *v.* Supreme Lodge Knights of Honor, 28 Mo. App. 463 (1888); Payn *v.* Rochester Soc., 6 N. Y. State Reporter, 365; Supreme Lodge Knights of Honor *v.* Wickser, 72 Tex. 257 (1888); Mutual Endowment Assoc. *v.* Essender, 59 Md. 463 (1882; see as to effect of notice given *in advance* of default). But the notice held sufficient, in Stewart *v.* Supreme Council American Legion of Honor, 36 Mo. App. 319 (1889). Under provision for payment of assessment within a fixed time from "date of notice," the time does not begin to run until the insured receives such notice, without respect to the date of the instrument containing such notice. Protection Co. *v.* Palmer, 81 Ill. 88 (1876); National Mutual Benefit Assoc. *v.* Miller, 85 Ky. 88 (1887). And held that the mere sending of the notice by mail, without it being received, would not work a forfeiture. McCorkle *v.* Texas Benev. Assoc., 71 Tex. 149 (1888). But under provision for payment within a fixed time from "date of *assessment*," the duty of the insurer was held complete on mailing the notice, and the failure of such assessment to reach the insured, did not excuse non-payment within the prescribed time. Weakly *v.* Northwestern Benev. Assoc., 19 Bradw. (Ill.), 327 (1885). And see Stanley *v.* Northwestern Assoc., 36 Fed. Rep. 75 (1887). So, where the contract provided that "sending notices by mail should be considered a legal notice," the insured was held bound by a notice

cordance with the particular provisions of each contract, that but few general rules can be profitably laid down in respect thereto.

§ 89. **Place of payment.**—In the absence of provision to the contrary, the agreement to pay premiums seems, as to the place of payment, governed by the rule applicable generally to agreements to pay, that is to say, the insured is bound to seek out the insurer for the purpose of payment.[1] This would, in effect, require payment at the home office of an insuring company. Of course, however, the place of payment may be the subject of special provision in the contract,[2] and such provisions are subject to the general rules of waiver.[3]

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mailed to, but not received by, him. Union Mutual Accident Assoc. *v.* Miller, 26 Ill. App. 230 (1887). So of provision that notice directed and sent to his post-office address, should be sufficient. Yoe *v.* B. C. Howard Assoc., 63 Md. 86 (1884).

[1] See Kenyon *v.* Knights Templar Assoc., 122 N. Y. 247, 260 (1890).

[2] A provision that "all receipts for premiums paid at agencies, are to be signed by the president or actuary," held not to create an agreement to make any particular agency the legal place of payment. (N. Y.) Co. *v.* Davis, 95 U. S. 425 (1877). See Bulger v. Washington Co., 63 Ga. 328 (1879). But the evidence was held sufficient to show an agreement to give notice where to pay. Ins. Co. *v.* Eggleston, 96 U. S. 572 (1877); Seamans *v.* Northwestern Mutual Co., 3 Fed. Rep. 325 (1880; holding 60 days' delay not unreasonable under circumstances). And the provisions of the contract held such as to show that a particular agency was made the place of payment. Manhattan Co. *v.* Warwick, 20 Gratt. (Va.), 614 (1871); McLean *v.* Piedmont & Arlington Co., 29 Id. 361, 367 (1877). In Piedmont & Arlington Co. *v.* McLean, 31 Id. 517 (1879), on the termination of such agency, the insurer was held bound to notify the insured as to whom and where payments should thereafter be made. S. P. Braswell *v.* American Co., 75 N. C. 8 (1876). See N. Y. Co. *v.* Hendren, 24 Gratt. (Va.), 536, 546 (1874).

[3] Provision for payment at principal office, held waived by usage in paying to local agent. Morey *v.* N. Y. Co., 2 Woods, 663 (1873). So, usage in paying to a general agent, held to make a payment to him

§ 90. **Mode of payment.**—A premium, as well as an assessment, is, in the absence of provision to the contrary, payable in cash. So well is this understood, that a local agent, at least, has no implied authority to receive payment otherwise than in cash.[1] But it is obvious that by agreement the payment may be made otherwise, as by check,[2] or draft,[3] or charging in account.[4] And, outside of cash pay-

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valid, though, just before making it, the insured received from the company a notice, on which were stamped the words "remit direct to the home office." McNeilly *v.* Continental Co., 66 N. Y. 23 (1876).

[1] Raub *v.* N. Y. Co., 14 N. Y. State Reporter, 573 (1888). Thus, he was held without authority to receive a note in payment. Continental Co. *v.* Willets, 24 Mich. 268, 272 (1872). See Bouton *v.* American Mutual Co., 25 Conn. 542, 555 (1857); Coombs *v.* Charter Oak Co., 65 Me. 382 (1876). And the authority of a *general* agent was held not to extend to receiving personal property in payment. Hoffman *v.* John Hancock Mutual Co., 92 U. S. 161 (1875); or to entering into an agreement to take premiums for ten years, in services as examiner for the company. Anchor Co. *v.* Pease, 66 Barb. 360 (1873). And in the following cases, the evidence was held insufficient to show a binding custom to sustain the authority of an agent to take premiums in services as examiner. Willcuts *v.* Northwestern Mutual Co., 81 Ind. 300, 304 (1882); Carter *v.* Cotton States Co., 56 Ga. 237 (1876). See as to agreement to take agent's board bill as payment, Texas Mutual Co. *v.* Davidge, 51 Tex. 244 (1879); to take advertisements in paper, Kentucky Mutual Co. *v.* Jenks, 5 Ind. 96 (1854).

[2] Thus of *assessment*, such payment being in accordance with the method long and uniformly adopted between the parties. Kenyon *v.* Knights Templars Assoc., 122 N. Y. 247, 262 (1890). Tender of a check held sufficient, though the amount was erroneous, it appearing that the insured relied on the promise of the insurer's agent to have the error corrected. Bigelow *v.* Life Assoc. of America, 15 N. Y. Weekly Digest, 261 (1882). See also, as to payment by check, Neill *v.* Union Mutual Co., 7 Ontario App. 171 (1882).

[3] Piedmont & Arlington Co. *v.* Ray, 50 Tex. 511, 518 (1878). As to effect of non-payment of foreign draft given for premium, see Knickerbocker Co. *v.* Pendleton, 112 U. S. 697 (1885); of order on third person, National Benefit Assoc. *v.* Jackson, 114 Ill. 533 (1885); Cotten *v.* Fidelity & Casualty Co., 41 Fed. Rep. 506, 511 (1890); Eury *v.* Standard Co., 14 Southwestern Rep. 929 (Supm. Ct. Tenn. 1890).

[4] Thus, where mutual accounts are kept between the insurer and the

ments, the most frequent mode of payment is by note, or, as it is commonly called, *premium note.*[1] And, so far as any of these means of payment are adopted, it is obvious that they are subject to the general rules applicable.[2]

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insured. Butler *v.* American Popular Co., 42 N. Y. Super. Ct. 342, 351 (1877); Missouri Valley Co. *v.* Dunklee, 16 Kans. 158 (1876). So, where the general agent of the insurer, in accordance with a custom, charged the premium to the insured, and credited the insurer with the amount. Matter of Booth, 11 Abb. N. C. 145, 148 (1882); Chickering *v.* Globe Mutual Co., 116 Mass. 321 (1874); Jones *v.* Ætna Co., 7 Reporter, 644 (1879). So as between insurer and reinsurer. Prince of Wales Co. *v.* Harding, El., Bl. & El. 183 (1858). But charging to the account of the agent of the insurer, and marking it paid, were held, under the circumstances, not to conclusively show payment. Wright *v.* Equitable Co., 41 N. Y. Super. Ct. 1 (1876); Acey *v.* Fernie, 7 Mees. & W. 151 (1840). So a mere charging to the account of the agent, held not payment. Brown *v.* Massachusetts Co., 59 N. H. 298, 309 (1879). In case of a policy taken out by a sub-agent of the insurer, an advance by such sub-agent to the general agent, on account of premiums which the former expected to collect, was regarded as a payment in advance, subject to the condition of the acceptance of the risk by the insurer. Thompson *v.* American Tontine Co., 46 N. Y. 674 (1871). As to mode of payment of assessment in benefit society, by a member who is also treasurer of a subordinate branch, see Farrie *v.* Supreme Council Catholic Legion, 15 N. Y. State Reporter, 155 (1888).

[1] Note of third person held payment. Michigan Mutual Co. *v.* Bowes, 42 Mich. 19 (1879); so note of insured. Tabor *v.* Michigan Mutual Co., 44 Mich. 324 (1880). That the issuing of a voidable policy may be a sufficient consideration to support a premium note, was asserted in Plympton *v.* Dunn, 148 Mass. 523 (1889). But recovery on a premium note defeated, by showing failure to deliver the policy according to the agreement under which the note was given. Lawrence *v.* Griswold, 30 Mich. 410 (1874). As to sufficiency of pleadings in action on such note, see Carmelich *v.* Mims, 88 Ala. 335 (1889). As to interest on premium notes, see Mutual Co. *v.* French, 30 Ohio St. 240, 254 (1876); Jarman *v.* St. Louis Mutual Co., 1 Flippin, 548 (1876). A premium note payable by its terms "at maturity," held to refer to and include the whole day when due, notwithstanding a provision in the contract requiring premiums generally to be paid "at noon" of the day when due. Leigh *v.* Knickerbocker Co., 26 La. Ann. 436 (1874).

[2] The validity of payment of a premium note, by sending the amount

§ 91. **Authority of agent of insurer with reference to payment.**—Apart from the question of the effect of *waiver* of a provision of the contract, the rules affecting the authority of an agent of the insurer, with reference to payment of premiums, are easily determined and applied.[1] Obviously, where the authority to receive payment is, by the terms of the contract, limited to a particular agent or class of agents, the insurer may insist on such condition;[2] but, on the other hand, it is equally obvious that such

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thereof by mail, in accordance with the instructions of a general agent, was sustained in Palmer *v.* Phœnix Mutual Co., 84 N. Y. 63 (1881). So the validity of payment by sending the amount of a premium by express, in accordance with the instructions of the insurer. Currier *v.* Continental Co., 53 N. H. 538 (1873). So payment of the premium held complete, where its amount was delivered to the express company, directed to the agent of the insurer. Whitley *v.* Piedmont & Arlington Co., 71 N. C. 480 (1874). In accordance with the course of dealing between the parties, validity of payment by sending check by mail sustained, though such check did not reach the insurer within the time prescribed for payment of premium. Kenyon *v.* Knights Templar Assoc., 122 N. Y. 247, 262 (1890).

[1] As to the authority of the agent with reference to mere mode of payment, see § 90.

The insured held precluded from objecting that an agent of the insurer had acted contrary to instructions, in the manner of receiving payment of the premium, where the insurer had ratified the acts of the agent. Leonard *v.* Washburn, 100 Mass. 251 (1868). As to evidence of authority as agent, for purpose of receiving payment of premiums, see generally, How *v.* Union Mutual Co., 80 N. Y. 32 (1880); Tennant *v.* Travelers' Co., 31 Fed. Rep. 322 (1887). As to limitation on authority of agent to receive premiums, see also Howell *v.* Charter Oak Co., 2 N. Y. Weekly Digest, 383 (1876); Shaft *v.* Phœnix Mutual Co., 8 Hun, 632 (1876); Diboll *v.* Ætna Co., 32 La. Ann. 179 (1880).

[2] Notice on back of policy, that payment to agents would not be deemed valid, unless a receipt signed by the president, secretary or actuary of the company, was taken at the time, held not a part of the contract of insurance, and hence held that payment to a general agent, without production of a receipt, was valid. McNeilly *v.* Continental Co., 66 N. Y. 23, 29 (1876; where, however, there was a waiver of the condition).

condition may be waived, as by ratifying the act of an agent in receiving the premium,[1] notwithstanding his original want of authority. But more difficult questions arise with reference to the effect of the receipt of a premium, where it is claimed that the contract has never taken effect, or that the rights of the insurer have become forfeited by reason of non-payment of the premium as agreed ; in other words, as to the authority of the agent to waive the payment agreed upon.[2] Where the authority of an agent or a particular class of agents, to waive payment, is denied by the terms of the contract, clearly the insurer may insist on this condition.[3] Yet, in accordance with the rule applicable

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[1] Wyman *v.* Phœnix Mutual Co., 119 N. Y. 274 (1890); Piedmont & Arlington Co. *v.* Lester, 59 Ga. 812 (1877); Mound City Mutual Co. *v.* Huth, 49 Ala. 529, 538 (1873); Mound City Mutual Co. *v.* Twining, 19 Kans. 349, 379 (1877). In Co-operative Assoc. *v.* McConnico, 53 Miss. 233 (1876), a provision that an agent had no authority to receive premiums, was held not waived, even though the insurer was in the habit of receiving from the agent premiums collected. This on the ground that the insurer regarded him as the agent of the *insured*, in so collecting and forwarding premiums. But this is certainly an extreme case.

[2] See, as to evidence of authority to waive prompt payment of premiums, Leslie *v.* Knickerbocker Co., 63 N. Y. 27, 34 (1875); Willcuts *v.* Northwestern Mutual Co., 81 Ind. 300, 310 (1882 ; general agent) ; Eclectic Co. *v.* Fahrenkrug, 68 Ill. 463 (1873) ; Currier *v.* Continental Co., 53 N. H. 538, 549 (1873); Mowry *v.* Home Co., 9 R. I. 346, 355 (1869); Nashville Co. *v.* Ewing, 2 Baxt. (Tenn.), 305 (1872; mere bookkeeper held without authority). The authority of an agent to become the transferee of a forfeited policy, accept the assignment as agent, and then enforce the contract by means of an antedated receipt for the premium, denied. Diboll *v.* Ætna Co., 32 La. Ann. 179 (1880).

[3] Brown *v.* Massachusetts Co., 59 N. H. 298, 308 (1879). Thus an agent was held without such authority, it being provided in the contract, that no alteration or waiver of its conditions should be good, "unless made at the head office and signed by an officer of the company." Marvin *v.* Universal Co., 85 N. Y. 278 (1881). So, where it was provided that no person except the president and secretary, acting together, were authorized to make, alter or discharge contracts, or waive forfeitures.

to written contracts generally, that any provision thereof may be abrogated by even a verbal agreement, a provision in a contract of insurance, denying the authority of an agent of the insurer, to waive a forfeiture for non-payment of a premium, may, even as to a local agent, be shown to have been abrogated, as, for instance, by usage of the parties,[1] though it is clear that the burden of proving such abrogation, is on the party claiming the benefit of its exercise.[2] But, in the absence of any provision in the con-

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Lantz *v.* Vermont Co., 20 Atlantic Rep. 80 (Supm. Ct. Pa. 1891). But, notwithstanding a provision that agents were "in no case authorized to waive forfeiture," yet held that authority to accept payment after the time when due, was impliedly given by a provision that acceptance of a premium after such time, should be considered as an act of grace or courtesy, and in no wise be construed as forming a precedent for future payments. American Co. *v.* Green, 57 Ga. 469 (1876).

[1] It has been laid down, that such a limitation, applicable in terms to agents generally, is not applicable to a *general* agent. Marcus *v.* St. Louis Mutual Co., 68 N. Y. 625 (1877); Hartford Co. *v.* Hayden, 13 Southwestern Rep. 585 (Ct. of App. of Ky. 1890). So of general manager and secretary of benefit society. Bankers' & Merchants' Assoc. *v.* Stapp, 77 Tex. 517. 523 (1890). To the contrary, as to general agent, dictum in Brown *v.* Massachusetts Co., 59 N. H. 298, 308 (1879). But, however this may be, the generally accepted doctrine is as stated in the text. (Globe Mutual) Co. *v.* Wolff, 95 U. S. 326 (1877); (Knickerbocker) Co. *v.* Norton, 96 U. S. 234 (1877); Phœnix Co. *v.* Doster, 106 U. S. 30 (1882; charge to that effect sustained); (National) Co. *v.* Tullidge, 39 Ohio St. 240 (1883); Willcuts *v.* Northwestern Mutual Co., 81 Ind. 300, 309 (1882; general agent); Eclectic Co. *v.* Fahrenkrug, 68 Ill. 463, 467 (1873); Penn Mutual Co. *v.* Keach, 32 Ill. App. 427, 436 (1889); affirmed in 26 Northeastern Rep. 106 (Supm. Ct. Ill. 1890); Dial *v.* Valley Mutual Assoc., 29 So. Car. 560, 583 (1888); Selvage *v.* John Hancock Mutual Co., 12 Fed. Rep. 603 (1882); Tennant *v.* Travelers' Co., 31 Fed. Rep. 322 (1887). Evidence of authority held sufficient, where the agent had in his possession receipts signed by the proper officers of the company. Mound City Mutual Co. *v.* Huth, 49 Ala. 529, 538 (1873).

[2] Catoir *v.* American Co., 33 N. J. Law, 487 (1868); Metropolitan Co. *v.* McGrath, 52 N. J. Law, 358 (1890); Brown *v.* Massachusetts Co., 59 N. H. 298, 308 (1879); Union Mutual Co. *v.* McMillen,

tract, limiting the authority of an agent to waive payment as agreed, we are confronted with the general question of the authority of agents of the insurer. In considering the general nature of the *status* of the so-called agent, as a means of communication between the insurer and the insured, we saw that he is, strictly speaking, not the agent of the insurer at all, but rather a mere broker or solicitor.[1] It follows that he has no *implied* authority to waive any condition with regard to payment of premiums;[2] in other

24 Ohio St. 67, 81 (1873; where the evidence of authority was held insufficient). See Franklin Co. *v.* Sefton, 53 Ind. 380, 389 (1876).

[1] See § 9.

[2] It must be admitted that there is much authority for a contrary view. Thus, authority to receive premiums has been held to imply authority to waive forfeiture of other conditions than that of prompt payment of premiums, as, for instance, a condition as to limits of residence. Walsh *v.* Ætna Co., 30 Iowa, 133, 143 (1870); Wing *v.* Harvey, 5 DeGex, M. & G. 265 (1854); Schmidt *v.* Charter Oak Co., 2 Mo. App. 339 (1876), And more directly in point is Murphy *v.* Southern Co., 3 Baxt. (Tenn.), 440 (1873), where a local agent, with authority to receive premiums, was held to have implied authority to waive their prompt payment, though acting in excess of his instruction. Here a case quite similar as to the facts, Bouton *v.* American Mutual Co., 25 Conn. 542 (1857), was distinguished on the ground that there the agent was agent for the single purpose of receiving the advance premium in that particular case, and of countersigning the policy. Contrary to Murphy *v.* Southern Co., seems Acey *v.* Fernie, 7 Mees. & W. 151 (1840). And in Merserau *v.* Phœnix Mutual Co., 66 N. Y. 274 (1876), one authorized to solicit and take applications for a foreign company, was held not to be its general agent, so as to waive conditions in the policy as to payment of premium. There were, however, restrictive provisions in the policy, similar to those in Marvin *v.* Universal Co., note 3, p. 167. But in case of officers or agents having a more extensive general authority than that of a mere local agent, the authority to waive such non-payment has frequently been declared. Thus of the president and general agent of the insuring company. Dilleber *v.* Knickerbocker Co., 76 N. Y. 567, 572 (1879); and of the assistant secretary. Piedmont & Arlington Co. *v.* McLean, 31 Gratt. (Va.), 517 (1879). In Dean *v.* Ætna Co., 62 N. Y. 642 (1875), an agent or general manager of a foreign company, attempted to extend the time for payment of a premium. He

words, where such authority is claimed to exist, the burden is on the party claiming the benefit of the exercise of such authority, to prove its existence, whether the payment in question be one upon the making of which the taking effect of the contract is conditioned, or one the failure to make which, produces a forfeiture of the rights of the insured.[1]

§ 92. **Applying dividends in payment.**—In many cases, the insured becomes, by the terms of the contract, entitled to a share in the profits of the business conducted by the insurer, such profits being commonly known as *dividends*. Unquestionably it is competent for the parties to contract that such dividends shall be applied in payment of pre-

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had previously extended the time on the policy in suit, as well as on another. He was in possession of printed blanks designed for that purpose, and his acts had been approved by the company. Held that he had the authority. So the agent or general manager of a foreign company, was held to have such authority, in Moffatt *v.* Reliance Mutual Soc., 45 Upper Canada, Q. B. 561 (1881). So to receive premium after time when due. Campbell *v.* National Co., 24 Upper Canada, C. P. 133 (1874).

[1] The authority of a local agent, to waive a condition in a written agreement for a contract of insurance, that the contract should not take effect until receipt of the premium by the insurer, declared. Sheldon *v.* Conn. Mutual Co., 25 Conn. 207 (1856). The authority of a general agent of a foreign company, to waive such a condition, contained both in the application and in the policy, declared. O'Brien *v.* Union Mutual Co., 22 Fed. Rep. 586 (1884). So where the condition was contained, as it seems, in the application only. Miller *v.* Brooklyn Co., 12 Wall. 285, 303 (1870); Southern Co. *v.* Booker, 9 Heisk. (Tenn.), 606 (1872; where, however, such application was part of the contract). See N. Y. Co. *v.* McGowan, 18 Kans. 300, 312 (1877). So of a general agent (but not a mere soliciting agent), to waive such a condition contained in the policy. Cronkhite *v.* Accident Co. of No. America, 35 Fed. Rep. 26 (1888). But the authority of *any* agent to waive such a condition, was denied in Ormond *v.* Fidelity Assoc., 96 N. C. 158 (1887); Davis *v.* Mass. Mutual Co., 13 Blatchf. 462 (1876).

miums.[1] But, in the absence of such a provision, it seems the better opinion, that the insurer is not bound to make such application.[2] The contract to pay premiums, as ordinarily expressed, clearly contemplates the actual transfer of money, or whatever else may be agreed on as the medium of payment, and as clearly does not contemplate that the insurer shall be obliged to resort to some fund accessible to him, and in which the insured has an interest.

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[1] Thus the insurer was held bound to so apply them, where there was not only a usage to so apply, but a request that they be so applied. Manhattan Co. *v.* Hoelzle, 8 Ins. L. J. 226 (1879), which was affirmed by a divided vote in the U. S. Supm. Ct.; see subsequent decision in 7 Reporter, 484 (1879). So also, where the contract provided for such application. Franklin Co. *v.* Wallace, 93 Ind. 7 (1883; where also the policy was declared "non-forfeiting"); Brooks *v.* Phœnix Mutual Co., 8 Reporter, 774 (1879). So, where it was provided that they should be applied to payment of interest on premium notes. Hull *v.* Northwestern Mutual Co., 39 Wis. 397 (1876); Smith *v.* St. Louis Mutual Co., 2 Tenn. Ch. 727, 745 (1877). Otherwise, where the course of business was, to apply the dividends to the principal, instead of the interest. Anderson *v.* St. Louis Mutual Co., 1 Flippin, 559 (1876). Damages allowed for fraudulent representations by the insurer, to the effect that the dividends always had been, and always would be, sufficient to pay the notes given for a part of the premium, and plaintiff held not estopped by allowing the notes to run to maturity, she having no means, during such time, of discovering the fraud. The cash paid by her was allowed as damages, with interest. Rohrschneider *v.* Knickerbocker Co., 76 N. Y. 216 (1879). See generally, as to application of dividends, Chicago Co. *v.* Warner, 80 Ill. 410 (1875); Currier *v.* Continental Co., 57 Vt. 496 (1885).

[2] Thus, the insurer was held not bound to make the application, in the absence of a request for such dividends, or that they be so applied. Wheeler *v.* Conn. Mutual Co., 82 N. Y. 543, 553 (1880). But to the contrary, seems Girard Co. *v.* Mutual Co., 97 Pa. St. 15, 25 (1881), where the insurer was held bound to make application, in the absence, it would appear, of any agreement to that effect. But, even in this view, the application would not extend to dividends earned, but not declared. Mutual Co. *v.* Girard Co., 100 Pa. St. 172 (1882). And the insured was held bound to show that the dividends claimed were sufficient for the purpose. Bulger *v.* Washington Co., 63 Ga. 328 (1879).

§ 93. **Evidence of payment.**—Where (as is commonly the case), performance by the insurer is conditioned on payment of the premiums, it would seem, on principle, that the burden of proving such payment, as agreed, is on the party claiming performance by the insurer, but the rule established by the authorities, seems to be to the contrary, that is to say, that the burden of proving non-payment, is on the insurer.[1] It is obvious that there may be many ways of proving payment, or non-payment, as the case may be. And, inasmuch as the effect of failure to prove payment, as agreed, is a forfeiture of the right to enforce such liability of the insurer, the tendency is, to apply the rules of evidence in this respect, somewhat liberally in favor of the party claiming performance by the insurer.[2] The question of greatest difficulty in this connection, is as to the effect of a receipt for a premium; in other words, a written acknowledgment by the insurer, that payment has been made.[3] Such

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[1] So of a premium note. Hodsdon *v.* Guardian Co., 97 Mass. 144 (1867). And of assessments. Tobin *v.* Western Mutual Aid Soc., 72 Iowa, 261 (1887); Scheufler *v.* Grand Lodge A. O. U. W., 47 Northwestern Rep. 799 (Supm. Ct. Minn. 1891).

[2] Thus, a renewal certificate, containing a provision that it should not be binding until payment of the premium, was held, under the circumstances, to be *prima facie* evidence of payment. Norton *v.* Phœnix Mutual Co., 36 Conn. 503 (1870). And see cases cited in notes below.

[3] A condition avoiding a policy in case of the premiums not being paid in a certain way, held not to refer to the first premium, payment of which was acknowledged in the policy. Palmer *v.* Phœnix Mutual Co., 84 N. Y. 63, 70 (1881). And a renewal receipt was held sufficient evidence of payment of a premium, though such receipt had not been actually delivered to the insured. Tennant *v.* Travelers' Co., 31 Fed. Rep. 322 (1887). Under a provision that receipts for premiums should not be valid without the seal of the company, held that the fact that a receipt offered in evidence did not have such seal, did not preclude introducing other evidence of the payment of the premium. American Co. *v.* Green, 57 Ga. 469 (1876). Where the application indorsed on the policy provided that the receipt for the premium "should be conclusive evidence" that the premium had been paid, the insurer was held es-

acknowledgment, being in its nature a mere receipt, is governed by the general rule applicable to receipts, as between the immediate parties to the contract, that such a receipt is mere presumptive evidence of payment, and as such, open to proof that payment has not in fact been made. In view of this general rule, it is perhaps somewhat questionable, whether there is valid ground for the distinction, that such acknowledgment is conclusive evidence of payment, where the effect of proving non-payment would be to avoid the contract;[1] and the true rule would seem to be,

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topped to set up non-payment of an order on a third person given for such premium, though such order provided that in case of its non-payment, all rights of the insured should be forfeited. Kline *v.* National Benefit Assoc., 111 Ind. 462 (1887; so held, where the application and the policy were placed in the hands of the beneficiary, and where the policy was by its terms incontestable, save for fraud or misrepresentation). A receipt for a premium stated that the policy was thereby continued for a year, subject to certain conditions specified. Held that the specification of such conditions, did not annul the effect of other conditions, not there specified, but specified in the policy. Douglas *v.* Knickerbocker Co., 83 N. Y. 492, 501 (1881). A provision that no payment of premiums should be binding on the insurer, unless *acknowledged* by a printed receipt signed by an officer of the company, held not to require that *payment* should be made to an officer. Manhattan Co. *v.* Warwick, 20 Gratt. (Va.), 614, 631 (1871). Where the insured was himself an agent of the company, a receipt signed by himself, was held insufficient evidence of payment of the premium. Neuendorff *v.* World Mutual Co., 69 N. Y. 389 (1877).

[1] So held in Robert *v.* New England Co., 1 Disn. (Ohio), 355, 360 (1857); 2 Id. 106, 113 (1858); Texas Mutual Co. *v.* Davidge, 51 Tex. 244 (1879). To same effect, it seems, Hudson *v.* Knickerbocker Co., 28 N. J. Eq. 167 (1877); Patch *v.* Phœnix Mutual Co., 44 Vt. 481 (1872); Brown *v.* Massachusetts Co., 59 N. H. 298 (1879). But to the contrary, holding such an acknowledgment of payment to estop the insurer from setting up non-payment, for the purpose of avoiding the contract, are Provident Co. *v.* Fennell, 49 Ill. 180 (1868); Teutonia Co. *v.* Mueller, 77 Ill. 22 (1875); Teutonia Co. *v.* Anderson, 77 Ill. 384 (1875); Trager *v.* Louisiana Equitable Co., 31 La. Ann. 235 (1879); Southern Co. *v.* Booker, 9 Heisk. (Tenn.), 606, 616 (1872). See Young *v.* Mutual Co.

that a written acknowledgment of the receipt of a premium, whether or not contained in the contract, is open to proof that the premium was not in fact paid, even though the effect is to avoid the contract, as, for instance, in case of non-payment of a premium note at maturity.[1]

§ 94. Effect of provision for forfeiture for non-payment.— Failure to perform an agreement to pay premiums, does not, of itself, in the absence of agreement to that effect, make the contract void,[2] and thus excuse the insurer from performance. But it is otherwise, where it is expressly agreed that the contract shall be void, in case of failure to pay a premium at the time agreed;[3] though, on the other

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of N. Y., 2 Sawyer, 325 (1872); Lee *v.* Fraternal Mutual Co., 1 Handy (Ohio), 217, 225 (1854).

[1] Baker *v.* Union Mutual Co., 43 N. Y. 283, 287 (1871); Pitt *v.* Berkshire Co., 100 Mass. 500; Thompson *v.* American Tontine Co., 46 N. Y. 674 (1871); Kerns *v.* N. J. Mutual Co., 86 Pa. St. 171 (1878; where the note was of even date with the policy). And an assignee of a policy was held to have no right to rely on an acknowledgment in the policy that the first premium had been paid, so far as to assume that it has been paid in cash, especially where it appeared from the policy itself, that it was contemplated that such payment might be by notes. How *v.* Union Mutual Co., 80 N. Y. 32, 40 (1880). But held that such acknowledgment throws on the insurer the burden of proving that he asserted his option to forfeit the policy for non-payment of the note; also that such option must be exercised with some degree of promptness, and in some unmistakable manner. Mutual Co. *v.* French, 30 Ohio St. 240, 248 (1876). This seems to overrule Robert *v.* New England Co., 1 Disn. (Ohio), 355, 367 (1857). And in case of such acknowledgment in the policy, non-payment of the note was held to create no forfeiture, in the absence from the note itself, of a provision for forfeiture. New England Mutual Co. *v.* Hasbrook, 32 Ind. 447 (1869).

[2] Kansas Protective Union *v.* Whitt, 36 Kans. 760 (1887).

[3] "Punctuality in the payment of premiums, is of the very essence of the contract, and, when payment is not made at the time, the company has the right to forfeit such contract." Peckham, J., in Holly *v.* Metropolitan Co., 105 N. Y. 437, 444 (1887; a case of failure to pay a renewal note given for the amount of the premium). And the doc-

hand, in accordance with a rule previously stated, a provision for such forfeiture is, in case of ambiguity, to re-

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trine stated in the text is also supported by Fowler *v.* Metropolitan Co., 116 N. Y. 389, 393 (1889); Thompson *v.* (Knickerbocker) Co., 104 U. S. 252 (1881); N. Y. Co. *v.* Statham, 93 U. S. 24 (1876); Lantz *v.* Vermont Co., 21 Atlantic Rep. 80 (Supm. Ct. Pa. 1891); Union Mutual Co. *v.* McMillen, 24 Ohio St. 67, 80 (1873); Ins. Co. *v.* Robinson, 40 Ohio St. 270 (1883); Robert *v.* New England Co., 1 Disn. (Ohio), 355 (1857); 2 Id. 106 (1858); Willcuts *v.* Northwestern Mutual Co., 81 Ind. 300, 306 (1882); Ewald *v.* Northwestern Mutual Co., 60 Wis. 431, 441 (1884); Williams *v.* Washington Co., 31 Iowa, 541 (1871); Hudson *v.* Knickerbocker Co., 28 N. J. Eq. 167 (1877); Marston *v.* Massachusetts Co., 59 N. H. 92 (1879); Security Co. *v.* Gober, 50 Ga. 404 (1873); Brooklyn Co. *v.* Bledsoe, 52 Ala. 538 (1875); Gaterman *v.* American Co., 1 Mo. App. 300 (1876); Madeira *v.* Merchants' Exchange Soc., 16 Fed. Rep. 749 (1883). Thus, where the contract was, that it should be void, if the insured failed to pay within 15 days after the premium became due, and he died after it became due, but before the expiration of the 15 days. So held, notwithstanding tender by his executors within the 15 days. Want *v.* Blunt, 12 East, 183 (1810). To similar effect, Simpson *v.* Accidental Death Co., 2 C. B. N. S. 257 (1857). See Lantz *v.* Vermont Co., 21 Atlantic Rep. 80 (Supm. Ct. Pa. 1891).

And the following circumstances have been held insufficient to prevent the forfeiture caused by such non-payment: Neglect of insurer, being a foreign corporation, to comply with the statutory provisions regulating the transaction of business by it. Union Mutual Co. *v.* McMillen, 24 Ohio St. 67 (1873). Failure of insurer to place receipt for premium in hands of local agent. Morey *v.* N. Y. Co., 2 Woods, 662 (1873). Reference in policy to the policy as "this non-forfeiting policy." Gates *v.* Home Mutual Co., 4 Am. L. Rec. (Cin. Ohio), 395 (1875). Existence of provision in policy for the issue of a paid-up policy. Attorney-General *v.* Continental Co., 93 N. Y. 70 (1883). And the rule was applied under special circumstances in the following cases: Howard *v.* Continental Co., 48 Cal. 229 (1874; see as to effect of option to change periods of payment, with consent of insurer); Patch *v.* Phœnix Mutual Co., 44 Vt. 481 (1872; non-payment of interest conditioned to be "paid in advance"); Donald *v.* Piedmont & Arlington Co., 4 So. Car. 321 (1873; where the insured was an agent of the insurer, authorized to receive payment from others); Grant *v.* Alabama Gold Co., 76 Ga. 575 (1886; where the insurer held the policy as collateral). In Weiner *v.* Metropolitan Co., 15 N. Y. Weekly Digest, 240

ceive the construction most unfavorable to the insurer.[1] Nor is the application of the rule producing such forfeiture, affected by the circumstance that the failure to pay at the time agreed, resulted from sudden and unexpected misfortune, or, as it is sometimes called, the "act of God," as in case of sickness,[2] or insanity.[3] And much

(1882), non-payment of a *quarterly* installment, was held not excused by the fact of the policy defining the premium as payments for a *year's* insurance. A forfeiture clause for non-payment of interest on premium notes, inserted in a new policy issued upon omission to pay premiums on the original policy, sustained in People *v.* Knickerbocker Co., 103 N. Y. 480 (1886), where the policy of following breaches of conditions by forfeiture, was indicated in the original policy, which provided that the new policy should be "subject to any notes that may have been received on account of premiums." S. P., Fowler *v.* Metropolitan Co., 116 N. Y. 389 (1889).

[1] Symonds *v.* Northwestern Mutual Co., 23 Minn. 491, 501 (1877). Thus, a provision "that the contract" should become forfeited for non-payment of any premium, held to apply only to premiums payable after the contract took effect, and the contract held not avoided for non-payment of premium notes *given* before, but *falling due* after, the contract took effect. McAllister *v.* New England Mutual Co., 101 Mass. 558 (1869). An order of the supreme lodge of a benefit organization, that in case of delinquency by a subordinate lodge in forwarding assessments, "if a death occur in said lodge during such suspension, no death benefit shall be paid," held not to absolutely cut off benefits, in case of death during such suspension, but only to postpone payment during such suspension. Supreme Lodge Knights of Honor *v.* Abbott, 82 Ind. 1 (1882).

[2] Thus, the contract was held void for non-payment, where, two hours before the expiration of the contract, the insured was fatally stricken with apoplexy and paralysis, and died the next day. Howell *v.* Knickerbocker Co., 44 N. Y. 276, 281 (1871). So where, seven days before the time, he was fatally stricken with apoplexy, and never regained consciousness. Dennis *v.* Mass. Benefit Assoc., 120 N. Y. 496 (1890). So in case of sickness and delirium. Yoe *v.* B. C. Howard Assoc., 63 Md. 86 (1884); and of unconsciousness and delirium. Carpenter *v.* Centennial Mutual Assoc., 68 Iowa, 453 (1886). See also, Smith *v.* Penn Mutual Co., 11 W. N. C. (Pa.), 295 (1882).

[3] Wheeler *v.* Conn. Mutual Co., 82 N. Y. 543 (1880); Hawkshaw *v.* Supreme Lodge Knights of Honor, 29 Fed. Rep. 770 (1887).

less would ignorance of the obligations imposed by the contract, be an excuse.[1] Nor is there anything in the nature of equity jurisdiction, that ordinarily, at least, operates to relieve from the forfeiture created by this non-performance of this express condition.[2] Yet the rule that equity will relieve against forfeiture for a breach caused by unavoidable accident, fraud, surprise, or ignorance, will, under proper conditions, be so applied as to prevent the forfeiture.[3]

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[1] Relief not allowed against forfeiture resulting from supposition of the insured that his policy was entirely "paid-up." Heim *v.* Metropolitan Co., 7 Daly, 536 (1878). But relief allowed against forfeiture resulting from supposition that he held a "participating" policy, that entitled him to a "paid-up" policy, such supposition being encouraged on statements made by an agent of the insurer. Piedmont & Arlington Co. *v.* Young, 58 Ala. 476 (1877). The fact that the beneficiary was, at the time, ignorant of the existence of the policy, held no ground for relief to him. Carpenter *v.* Centennial Mutual Assoc., 68 Iowa, 453 (1886); even in equity. Klein *v.* N. Y. Co., 104 U. S. 88 (1881). See, however, Whitehead *v.* N. Y. Co., note 3, below.

[2] Klein *v.* N. Y. Co., 104 U. S. 88 (1881); Knickerbocker Co. *v.* Dietz, 52 Md. 16 (1879); Anderson *v.* St. Louis Mutual Co., 1 Flippin, 559 (1876). So a bill to ascertain the value of a policy that had been forfeited for non-payment of premium, held not maintainable. Kellner *v.* Mutual Co., 43 Fed. Rep. 623 (1890). Refusal of the insurer to reduce an extra to an ordinary premium, held not ground for relief in equity, where, by the terms of the contract, a discretion was given as to refusing or consenting to such reduction. Manby *v.* Gresham Co., 29 Beavan, 439 (1861). And where the contract was void for non-payment of premium or interest, the insured was held entitled to no equitable compensation for premiums paid. Ewald *v.* Northwestern Mutual Co., 60 Wis. 431, 446 (1884; holding that, at any rate, he was not entitled to a proportion of the insurance, under another stipulation of the contract, made with no reference to the non-payment of the interest, for default in paying which the contract was void). And equitable relief against forfeiture for non-payment of interest on a premium note, was refused, in Attorney-General *v.* North American Co., 82 N. Y. 172, 190 (1880); Clausen *v.* Russell, 18 N. Y. Weekly Digest, 10 (1883).

[3] Thus, recovery of the amount insured was allowed in Whitehead

§ 95. **Effect of existence of war as excuse for non-payment.** —If the contract, by its terms, is to be void, in case of failure to pay a premium at a time agreed, and if, as we have seen, the failure to pay is not excused because of resulting from sudden and unexpected misfortune, it is difficult, at least, to discover any sound basis for the alleged doctrine that such failure is excused by the existence of war between the State or country to which the insurer belongs, and that to which the insured belongs.[1] But if the failure to pay results from the refusal of the insurer to accept the premiums, on the ground of the existence of war, such failure is, as in other cases of refusal to accept premiums when tendered, excused.[2] And if, as we have

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v. N. Y. Co., 33 Hun, 425, 430; affirmed in 102 N. Y. 143 (1886; where the beneficiaries had no knowledge of the existence of the contract until after the death of the insured, he having fraudulently surrendered the policy, and no premiums being paid after such, surrender). See also, Piedmont & Arlington Co. *v.* Young, note 1, p. 177.

[1] The doctrine that the existence of war excuses payment of the premium, was denied in N. Y. Co. *v.* Statham, 93 U. S. 24 (1876); Worthington *v.* Charter Oak Co., 41 Conn. 372 (1874); Dillard *v.* Manhattan Co., 44 Ga. 119 (1871). Even where the insured had tendered the premium to one who, prior to the war, was acting as agent of the insurer. (N. Y.) Co. *v.* Davis, 95 U. S. 425 (1877). But the contrary doctrine, that the existence of war, under the conditions stated in the text, excuses payment of the premium, was asserted in Wheeler *v.* Conn. Mutual Co., 82 N. Y. 543 (1880); Cohen *v.* N. Y. Mutual Co., 50 N. Y. 610 (1872; where tender of the premiums after the war, was held to revive the policy); Martine *v.* International Co., 53 N. Y. 339 (1873; applying the rule to a *foreign* company doing business in a State at war with that to which the insured belonged); Hillyard *v.* Mutual Benefit Co., 35 N. J. Law, 415 (1872); affirmed in 37 N. J. Law, 444 (1874); N. Y. Co. *v.* Hendren, 24 Gratt. (Va.), 536 (1874); Conn. Mutual Co. *v.* Duerson, 28 Gratt. (Va.), 630, 638 (1877; where, the insured having died *pendente bello*, the contract was held not forfeited for failure of his personal representative to tender the unpaid premiums, after the termination of the war); Clemmitt *v.* N. Y. Co., 76 Va. 355 (1882). See also, Diboll *v.* Ætna Co., 32 La. Ann. 179 (1880).

[2] On this ground may be sustained, as not inconsistent with the

seen, forfeiture for non-payment of premiums, is not, ordinarily at least, ground for relief in *equity*, it is difficult to discover any sound basis for the alleged doctrine that, though the contract is *void* for the non-payment of premiums, notwithstanding the existence of war, yet there remains an *equitable value* in the contract.[1] It may be stated generally, that the relaxation of accepted legal principles, in case of this class of forfeitures, seems to have resulted only from the strong sense of sympathy produced by a contemplation of the manifold hardships likely to result from the strict application of such principles.

§ 96. Effect of insolvency of insurer, as excuse for non-payment.—The business of insurance being commonly conducted by corporations, or "companies," the effect of the insolvency of the company at the time of the premium falling due, is to be considered. That such insolvency is an excuse for non-payment, seems the generally accepted doctrine, at least, when the company has ceased to do business, and transferred all its assets.[2] A mere suspicion or

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cases cited in note 1, p. 178, the following cases, where the right to refuse tender of the premium, on the ground of existence of war, was denied. Manhattan Co. *v.* Warwick, 20 Gratt. (Va.), 614, 630 (1871); Mutual Benefit Co. *v.* Atwood, 24 Gratt. (Va.). 497 (1874); N. Y. Co. *v.* Clopton, 7 Bush (Ky.), 179 (1870). So in N. Y. Co. *v.* Clemmitt, 77 Va. 366 (1883), holding that the repudiation by the insurer of the binding force of the contract, excused a tender of premiums.

[1] Thus, in such case the insured was held entitled to recover the *equitable value* of the contract. N. Y. Co. *v.* Statham, above; Abell *v.* Penn Mutual Co., 18 W. Va. 400, 427 (1881; holding that if the insurer does not elect to revive the contract, it should pay the insured an annuity during his life, sufficient, with the premiums he had by his contract to pay, to enable him, as of the time of the forfeiture, to obtain insurance for the same amount elsewhere; or to pay him in cash the present value of such annuity, as of the time of the forfeiture).

[2] People *v.* Empire Mutual Co., 92 N. Y. 105 (1883); Jones *v.* Life Assoc. of America, 83 Ky. 75 (1885); Smith *v.* St. Louis Mutual Co., 2 Tenn. Ch. 727, 740 (1877); Cook's Case, 9 L. R. Eq. 703 (1870). So

impression of such insolvency, however, without a formal declaration of it in some manner, would be insufficient as an excuse.[1] And, to constitute an excuse, the omission to pay must have been on the ground of such insolvency, and not merely on the ground of the intention of the insured to abandon the contract.[2] And though, in case of insolvency, the insured is not under any obligation to undertake the responsibility of seeking out the proper party to whom payment of the premium may be made, it by no means follows that such insolvency constitutes a defense to a proceeding brought by the proper representative of the insolvent company, to enforce an otherwise valid obligation of the insured.[3]

§ 97. **Effect of refusal to receive premiums previously tendered, as excuse for non-payment.**—The refusal of the insurer, without just cause, to receive a premium tendered, is regarded as sufficiently indicating an intention to refuse subsequently accruing premiums; hence the rights of the insured are not, in such case, prejudiced by his failure to tender such subsequently accruing premiums.[4]

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where a receiver had been appointed, and given notice that he would receive no more premiums. Attorney-General *v.* Guardian Mutual Co., 82 N. Y. 336 (1880). So also, where a receiver had been appointed. Attorney-General *v.* Continental Co., 33 Hun, 138, 142 (1884). So in case of a benefit society that had ceased to do business. Burdon *v.* Mass. Safety Fund Assoc., 147 Mass. 360, 369 (1888). See Universal Co. *v.* Binford, 76 Va. 103, 109 (1882).

[1] People *v.* Globe Mutual Co., 32 Hun, 147, 151 (1884).

[2] Attorney-General *v.* Continental Co., 64 How. Pr. 519 (1882); People *v.* Globe Mutual Co., 32 Hun, 147, 150 (1884).

[3] Thus, such insolvency was held no defense to an action on a premium note. Conigland *v.* N. C. Mutual Co., Phil. Eq. (N. C.), 341 (1868; holding also that the insured could not set off the value of his policy). s. p., North Carolina Mutual Co. *v.* Powell, 71 N. C. 389 (1874). And held no defense to such an action, that the company had voted to cancel all its policies, if the insured did not also consent to such cancellation. Alliance Mutual Co. *v.* Swift, 10 Cush. (Mass.), 433 (1852).

[4] Miesell *v.* Globe Mutual Co., 76 N. Y. 115 (1879); Meyer *v.*

§ 98. **Necessity of indication of intention of insurer to enforce forfeiture for non-payment.**—If the contract by its terms is to be void for failure to pay a premium at a time agreed, it is void for such non-payment, without any notice to that effect being given by the insurer.[1] To hold otherwise, would be to import into the contract a provision not originally contained in it. But, generally speaking, the question whether it is necessary for the insurer to take any affirmative action, in order to produce a forfeiture for non-payment, must be determined with reference to the provisions of each particular contract.[2]

Knickerbocker Co., 73 N. Y. 516, 528 (1878); Girard Co. *v.* Mutual Co., 86 Pa. St. 236 (1878). In Hayner *v.* American Popular Co., 69 N. Y. 435 (1877), the effect of litigation happening between the parties, subsequently to the tender and refusal, was considered, and the failure of the insurer to act on an application for a paid-up policy, was regarded as sufficiently dispensing with the necessity for a further tender.

[1] Roehner *v.* Knickerbocker Co., 63 N. Y. 160, 163 (1875); Heim *v.* Metropolitan Co., 7 Daly, 536 (1878; non-payment of premium note); Lantz *v.* Vermont Co., 21 Atlantic Rep. 80 (Supm. Ct. Pa. 1891). But, in conflict with these authorities, as well as with what seem to us to be fundamental principles of the law of contracts, a provision that the contract should be null and void in case of non-payment of the premium, was held to merely create an option on the part of the insurer to declare the contract void, and held that such option must be asserted by clear and unequivocal acts; that the question whether the insurer has exercised such option, is one of fact. Mutual Co. *v.* French, 30 Ohio St. 240 (1876; where the provision for forfeiture was contained, not in the policy, but in a premium note). This seems to overrule Robert *v.* New England Co., 1 Disn. (Ohio), 357, 367 (1857). But in Bosworth *v.* Western Mutual Aid Soc., 75 Iowa, 582 (1888), the court refused to construe "void" as meaning "voidable at the election of the insurer." And that the contract is *ipso facto* terminated by non-payment of the premium, without action on the part of the insurer to indicate intention to enforce the forfeiture, seems the doctrine of Ashbrook *v.* Phœnix Mutual Co., 94 Mo. 72, 78 (1887). As to effect of provision making the contract void in such case, "without notice to any party interested," see Pendleton *v.* Knickerbocker Co., 5 Fed. Rep. 238, 240 (1881).

[2] Under a rule of a benefit society, that "any member failing to pay an assessment within 30 days *shall be suspended*," held that some

§ 99. **Waiver of forfeiture for non-payment.**—Although, generally speaking, as we have seen, if the contract by its terms is to be void for failure to pay a premium at the time agreed, it is void for such non-payment, without any notice or other indication of the intention of the insurer to enforce such forfeiture, yet the transactions between the parties may be such, that the forfeiture otherwise resulting is avoided, in other words, waived.[1] Sometimes the transaction relied on as constituting a waiver, consists in an agreement entered into prior to the time of payment of the premium in question. Such agreement may, indeed, be contained in the original contract of insurance, and, in order to determine whether such agreement exists, it is frequently necessary to consider the general scope of the contract. In this view, the contract may sometimes have the effect of not providing for forfeiture for non-payment,[2]

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affirmative act on the part of the society, was necessary to produce a forfeiture. Scheu *v.* Grand Lodge Independent Foresters, 17 Fed. Rep. 214 (1883). But even under such a rule, held, in view of other provisions in the rules, that no such affirmative act was necessary. McDonald *v.* Chosen Friends, 78 Cal. 49, 55 (1888). So, where the provision was, that he "shall cease to be a member, and the secretary shall strike his name from the roll," such action of the secretary was held unnecessary to produce a forfeiture. Rood *v.* Railway Passenger Assoc., 31 Fed. Rep. 62 (1887). So, where it was expressly provided that he should, "by the fact of such non-payment, stand suspended, and no action on the part of the lodge, or any officer thereof, should be required as essential to such suspension." Scheufler *v.* Grand Lodge A. O. U. W., 47 Northwestern Rep. 799 (Supm. Ct. Minn. 1891). See Millard *v.* Millard, 81 Cal. 340, 347 (1889).

[1] Such waiver is available in a court of law. Robinson *v.* St. Louis Mutual Co., 7 Reporter, 358 (1878; dismissing suit to enjoin insurer from setting up defense of non-payment in action at law on contract).

[2] In MacIntyre *v.* Cotton States Co., 82 Ga. 478 (1889), the question was, whether, under the terms of the contract, interest was, while the contract was running to maturity, chargeable on premium money retained by the insured as a loan from the insurer, also, whether the contract imported a guaranty that dividends would be sufficient to pay such

even though it may contain a particular provision that, considered by itself, would have that effect.[1] But the

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interest. As to effect of provisions for reinstatement in benefit society, see cases cited in note 1, p. 186.

[1] This principle has been frequently applied in case of a special class of contracts that, in view of the statutes and of the general provisions of the contract, have been regarded as not avoided by failure to pay the *principal of premium notes* when due, such notes being regarded as in the nature of receipts for loans. In the following cases the contract was held not avoided by failure to pay the principal of premium notes when due. (Northwestern Mutual) Co. *v.* Bonner, 36 Ohio St. 51 (1880); Northwestern Mutual Co. *v.* Little, 56 Ind. 504 (1877); Franklin Co. *v.* Wallace, 93 Ind. 7 (1883); Symonds *v.* Northwestern Mutual Co., 23 Minn. 491 (1877); Ohde *v.* Northwestern Mutual Co., 40 Iowa, 357 (1875); Fithian *v.* Northwestern Co., 4 Mo. App. 386 (1877). See Watts *v.* Atlantic Mutual Co., 31 Upper Canada, C. P. 53 (1880). But held avoided by failure to pay interest thereon. Northwestern Mutual Co. *v.* Bonner, above (and see other cases cited above); Knickerbocker Co. *v.* Harlan, 56 Miss. 512 (1879); Ewald *v.* Northwestern Mutual Co., 60 Wis. 431 (1884); Anderson *v.* St. Louis Mutual Co., 1 Flippin, 559 (1876); Russum *v.* St. Louis Mutual Co., 1 Mo. App. 228 (1876); Moser *v.* Phœnix Mutual Co., 2 Mo. App. 408 (1876); Holman *v.* Continental Co., 54 Conn. 195 (1886); Smith *v.* St. Louis Mutual Co., 2 Tenn. Ch. 727, 743 (1877); McQuitty *v.* Continental Co., 15 R. I. 573 (1887); Nettleton *v.* St. Louis Mutual Co., 7 Bissell, 293 (1876). Compare Knickerbocker Co. *v.* Dietz, 52 Md. 16 (1879). But in Hull *v.* Northwestern Mutual Co., 39 Wis. 397 (1876), the contract was held such that even failure to pay interest did not produce a forfeiture. So in Fithian *v.* Northwestern Co., 4 Mo. App. 386 (1877); Tutt *v.* Covenant Mutual Co., 19 Mo. App. 677 (1885); Bruce *v.* Continental Co., 58 Vt. 253 (1885); Cowles *v.* Continental Co., 63 N. H. 300 (1885); Eddy *v.* Phœnix Mutual Co., 18 Atlantic Rep. 89 (Supm. Ct. N. H. 1889); Gardner *v.* Union Central Co., 5 Fed. Rep. 430 (1880); Northwestern Mutual Co. *v.* Ross, 63 Ga. 199 (1879); St. Louis Mutual Co. *v.* Grigsby, 10 Bush (Ky.), 310 (1874); Northwestern Mutual Co. *v.* Fort, 82 Ky. 269 (1884). A policy containing peculiar provisions was, in the light of the practical construction put upon similar policies by the insurer, so construed that the insured was held entitled, on electing to discontinue the payment of premiums, to a paid-up policy, without first paying a note held by the insurer for past premiums, but that such note, with interest, less the dividends, was to be deducted from the amount insured,

agreement entered into prior to the time of payment, and relied on as constituting a waiver, may not be contained in the original contract of insurance. The validity of such an agreement is, of course, controlled by the general rule, that a written contract supersedes prior and contemporaneous parol negotiations.[1] And, speaking generally of all these agreements entered into prior to the time of payment, the waiver may be supported on the ground of sufficiency of consideration, even where it is not to be supported on the ground of estoppel,[2] that is to say, the

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when the policy became payable. Dutcher *v.* Brooklyn Co., 3 Dillon, 87 (1874); which was affirmed in (Brooklyn) Co. *v.* Dutcher, 95 U. S. 269 (1877).

[1] So of expectation held out at the time of giving a premium note, that the contract would become void only on the election of the insurer. Thompson *v.* (Knickerbocker) Co., 104 U. S. 252, 259 (1881). On the same principle, in Fowler *v.* Metropolitan Co., 116 N. Y. 389 (1889), failure to pay interest on a premium note, was held not waived by statements in a pamphlet distributed by the insurer in the course of its business, that "all policies are non-forfeitable," and that "30 days' grace was allowed in payment of premiums." But, as sustaining the validity of agreements for waiver, entered into *after* the making of the original contract of insurance, as, for instance, that in case of anything happening to prevent prompt payment, a reasonable time should be allowed for the purpose, see Howell *v.* Knickerbocker Co., 44 N. Y. 276, 282 (1871); Dilleber *v.* Knickerbocker Co., 76 N. Y. 567, 572 (1879). In Howell *v.* Knickerbocker Co., a tender of the premium, within a reasonable time, though *after the death of the insured,* was held to satisfy the condition.

[2] See Marvin *v.* Universal Co., note 1, p. 185. Thus, in Dean *v.* Ætna Co., 62 N. Y. 642 (1875); Homer *v.* Guardian Mutual Co., 67 N. Y. 478, the agreement to extend was made before the time of payment, and there was also in the Dean case the element of estoppel, as the company had actually received the notes of the insured for the payment of three-fourths of the premium. Compare Leslie *v.* Knickerbocker Co., 63 N. Y. 27, 31 (1875). A declaration made by the insurer prior to the time fixed for payment of the premium, to the effect that it repudiates the contract of insurance, is sufficient to excuse non-payment of that and other premiums subsequently falling due, but it is entitled to credit for the amount of such premiums. Shaw *v.* Republic Co., 69 N. Y. 286 (1877).

mere omission to pay is regarded as a consideration for the agreement not to take advantage of the omission to pay. But where the evidence of waiver is to be found in acts or statements of the insurer *subsequent* to the failure to pay, the question may arise, whether the waiver is supported by a sufficient consideration. The question of consideration has, however, been generally disregarded, it seeming to be assumed that the element of estoppel is sufficient to support the waiver. But, strictly speaking, where the element of estoppel is wanting, a waiver happening subsequently to the failure to pay, should be supported by a sufficient consideration.[1] Apart from the question of the necessity of a consideration, however, the circumstances sufficient to

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[1] Marvin *v.* Universal Co., 16 Hun, 494; affirmed on another ground in 85 N. Y. 278 (1881). Thus, a mere promise made after default, to accept payment at a future time, held not to so restore the contract, as to enable recovery thereon for a loss happening before the time agreed for payment. Lantz *v.* Vermont Co., 21 Atlantic Rep. 80 (Supm. Ct. Pa. 1891). It is conceded, however, that the actual *acceptance* of such overdue premium, would have constituted a waiver. But in Dilleber *v.* Knickerbocker Co., 76 N. Y. 567, 572 (1879), the agreement, though made after the time had expired, was held valid, as, in accordance with it, the insured gave his note, which was afterward collected. So in True *v.* Bankers' Assoc., 47 Northwestern Rep. 520 (Supm. Ct. Wis. 1890), where the insured, in accordance with the request of the insurer, gave his draft for the amount. So in Wyman *v.* Phœnix Mutual Co., 119 N. Y. 274, 279 (1890), where the insured agreed to pay the premium within a certain time, or take out a paid-up policy. But in (Knickerbocker) Co. *v.* Norton, 96 U. S. 234 (1877), an agreement to extend payment of a premium note *past due*, was held valid, even though without consideration. But expressions herein, conflicting with the rule as laid down in the text, are, in Lantz *v.* Vermont Co., above, criticised as dicta. As to effect of proposition that the contract shall revive, on production by the insured of a certificate of his good health, see Miesell *v.* Globe Mutual Co., 76 N. Y. 115 (1879; where it was laid down that the insurer could not be dissatisfied with the certificate capriciously). S. P., of provision for reinstatement by benefit society, on production of "satisfactory certificate of health." Jackson *v.* Northwestern Mutual Assoc., 47 Northwestern Rep. 733, 737 (Supm. Ct. Wis. 1891). And see note 1, p. 191.

produce a waiver, are so infinite in number and variety, that it is impracticable to lay down a more specific rule than that, as forfeitures generally are regarded as odious, a waiver will be found on slight evidence.[1] It will be noticed

[1] Lyon *v.* Travelers' Co., 55 Mich. 141 (1884); Young *v.* Mutual Co. of N. Y., 2 Sawyer, 325 (1872). The evidence was held sufficient to show such waiver, in Chicago Co. *v.* Warner, 80 Ill. 410 (1875; accepting part of premium without intimation that the contract would be declared forfeited, unless the balance were paid); Kantrener *v.* Penn Mutual Co., 5 Mo. App. 581 (1878; refusal by agent to accept premium, on ground of his not having received receipts therefor from home office). The forfeiture was held waived by extension of time for payment, and recovery was allowed on the contract, though the insured died between the time of forfeiture and the time fixed for payment. Homer *v.* Guardian Mutual Co., 67 N. Y. 478 (1876); where, as pointed out in Lantz *v.* Vermont Co., 20 Atlantic Rep. 80 (Supm. Ct. Pa. 1891), the agreement was entered into before the time of payment. So, where the policy provided "that the premiums should be paid" on March 1, "or within 35 days thereafter," recovery was allowed, though the insured died on March 24, the premium being paid by another person after the death of the insured, and before the expiration of the 35 days. Worden *v.* Guardian Mutual Co., 39 N. Y. Super Ct. 317 (1875; where the policy had prominently at its head, the words "non-forfeiting policy"). Compare Want *v.* Blunt, (see note 2, p. 174). An agreement for waiver construed as relating to the entire life of the contract, and not as confined to a single default. Dilleber *v.* Knickerbocker Co., 76 N. Y. 567, 572 (1879). Effect of demanding payment of premium after due, held neutralized by refusal to pay. Edge *v.* Duke, 18 L. J. Ch. 183 (1849). But a retention of the premium pending investigation and litigation, held not a waiver. Lewis *v.* Phœnix Mutual Co., 44 Conn. 72, 91 (1876). So of retention of the policy as bailee of the insured. Howard *v.* Mutual Benefit Co., 6 Mo. App. 576 (1879). And default in payment of a premium note, was held not waived by the mere fact of the insurer retaining the note after default, without seeking out the person liable thereon. How *v.* Union Mutual Co., 80 N. Y. 32, 43 (1880); Roehner *v.* Knickerbocker Co., 63 N. Y. 160, 163 (1875); Robert *v.* New England Co., 1 Disn. (Ohio), 355, 369 (1857; note payable to order); 2 Id. 106, 114 (1858). Compare Prentice *v.* Knickerbocker Co., 77 N. Y. 483 (1879), as distinguished in How *v.* Union Mutual Co. In Willcuts *v.* Northwestern Mutual Co., 81 Ind. 300, 313 (1882), the evidence was held insufficient to show a waiver by allowing credit. In Melin *v.*

that where the facts are undisputed, the question of waiver is, ordinarily at least, one of law. Assuming now that, in

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Accident Co. of No. America, 70 Wis. 579 (1888), payment of a benefit for an injury, was held not to operate as a waiver. For other cases as to the sufficiency of evidence to show a waiver, see Kolgers *v.* Guardian Co., 10 Abb. Pr. N. S. 176 (1871); Buckbee *v.* U. S. Co., 26 Barb. 541 (1854); How *v.* Union Mutual Co., 80 N. Y. 32, 41 (1880); Robertson *v.* Metropolitan Co., 47 N. Y. Super. Ct. 377 (1881); Hodsdon *v.* Guardian Co., 97 Mass. 144 (1867); Crossman *v.* Mass. Benefit Assoc., 143 Mass. 435 (1887); Bouton *v.* American Mutual Co., 25 Conn. 542, 551 (1857); Wilmot *v.* Charter Oak Co., 46 Conn. 483, 494 (1878); McLean *v.* Piedmont & Arlington Co., 29 Gratt. (Va.), 361, 372 (1877); Jacobs *v.* National Co., 1 MacArthur (D. C.), 632 (1874); Coffey *v.* Universal Co., 7 Fed. Rep. 301 (1881); Georgia Masonic Co. *v.* Gibson, 52 Ga. 640 (1874); Fitzpatrick *v.* Mutual & Benev. Assoc., 25 La. Ann. 443 (1873); Lyon *v.* Travelers' Co., 55 Mich. 141 (1884); Froelich *v.* Atlas Co., 47 Mo. 406 (1871); Hanley *v.* Life Assoc. of America, 69 Mo. 380 (1879); Ashbrook *v* Phœnix Mutual Co., 94 Mo. 72 (1887); True *v.* Bankers' Assoc., 47 Northwestern Rep. 520 (Supm. Ct. Wis. 1890); Kansas Protective Union *v.* Whitt, 36 Kans. 760 (1887); McCorkle *v.* Texas Benev. Assoc., 71 Tex. 149 (1888); Diboll *v.* Ætna Co., 32 La. Ann. 179 (1880); Horton *v.* Provincial Provident Inst., 16 Ontario Rep. 382 (1888); affirmed in 17 Id. 361 (1889).

The right of a benefit society to waive forfeiture for non-payment of assessments, was denied in a case where the holders of other certificates had been benefited by such forfeiture, by the very terms of the certificate held by the delinquent member. Milligan *v.* Goddard, 1 How. Pr. N. S. 377 (1885). And the authority of the *officers* of such a society to waive such forfeiture, was denied in Lyon *v.* Supreme Assembly Royal Soc., 26 Northeastern Rep. 236 (Supm. Ct. Mass. 1891). But ordinarily a benefit society may waive such payment. Baker *v.* N. Y. State Mutual Benefit Assoc., 27 N. Y. Weekly Digest, 91 (1887); Shay *v.* National Benefit Soc., 54 Hun, 109 (1889); Protection Co. *v.* Foote, 79 Ill. 361 (1875; transmission by mail); Erdmann *v.* Order of Herman's Sons, 44 Wis. 377 (1878); McDonald *v.* Chosen Friends, 78 Cal. 49 (1888); and see other cases among those cited above. As by levying and accepting payment of a subsequent assessment. Rice *v.* New England Mutual Co., 146 Mass. 248 (1888); Sweetser *v.* Odd Fellows' Mutual Aid Assoc., 117 Ind. 97, 101 (1888); Millard *v.* Legion of Honor, 81 Cal. 340, 345 (1889); Rowswell *v.* Equitable Aid Union, 13 Fed. Rep. 840 (1882); Hoffmann *v.* Supreme Council American Legion of Honor, 35 Fed. Rep. 252 (1888). Evidence

one of the ways just specified, the contract has been revived, it is undoubtedly, in the absence of provision to the contrary, reinstated upon its original terms, but it is obvious that additional terms may be imposed by express agreement.[1]

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of waiver by a benefit society held insufficient, in Illinois Masons' Soc. *v.* Baldwin, 86 Ill. 479 (1877); Borgraefe *v.* Supreme Lodge Knights of Honor, 22 Mo. App. 127, 143 (1886; where, under the rules, a judicial determination of suspension by the society, was held unnecessary); Lyon *v.* Supreme Assembly Royal Soc., 26 Northeastern Rep. 236 (Supm. Ct. Mass. 1891); Wells *v.* Independent Order of Foresters, 17 Ontario Rep. 317 (1889). As to effect of provision for reinstatement after failure to pay premium at the time appointed, see Ingram *v.* Supreme Council American Legion of Honor, 14 N. Y. State Reporter, 600; Manson *v.* Grand Lodge A. O. U. W., 30 Minn. 509 (1883); McDonald *v.* Chosen Friends, 78 Cal. 49 (1888). Reinstatement held sufficiently shown, where the insured, in accordance with the contract, forwarded the necessary papers to the insured by mail, though she died before they actually reached the insurer. Jackson *v.* Northwestern Mutual Assoc., 47 Northwestern Rep. 733 (Supm. Ct. Wis. 1891). Whether sending "reinstatement notices" operated as a waiver of forfeiture for non-payment of assessments, held under the circumstances for the jury. Id. The reasonableness of a delay of several weeks in applying for reinstatement after forfeiture, held under the circumstances for the jury. Id. Under a provision that, in case of non-payment of assessment when due, the contract should be void, but that the insured, "for *valid reasons* to the officers of the association (such as a failure to receive notice of an assessment), *might be* reinstated by paying assessment arrearages," held that a forfeiture for non-payment when due, would be prevented by proof that the insured intended to pay, that he was prevented by sudden illness, depriving him of consciousness, and that the beneficiary tendered the assessment after the death of the insured. And held that the officers of the association could not arbitrarily refuse to accept such excuse as "valid." Dennis *v.* Mass. Benefit Assoc., 120 N. Y. 496 (1890). This decision we regard as clearly unsound, as the contract so plainly made the reinstatement *optional with*, not *obligatory upon*, the insurer, without reference to the "validity" of the reason.

[1] Metropolitan Co. *v.* McTague, 49 N. J. Eq. 587 (1887). As to whether, when the renewal is made on statements in the original application, the truth of such statements is to be tried by the circumstances

§ 100. **The same; waiver by usage of giving time for payment.**—The cases of waiver already considered, so far as such waiver has consisted in acts of the insurer, have, generally speaking, been cases where the acts relied on as constituting a waiver, occurred in immediate connection with the particular default in question. But we now consider cases where the acts so relied on do not, necessarily at least, occur in immediate connection with the particular default, but consist of indulgences happening in connection with past defaults, but relied on as a waiver of the particular default; in other words, as constituting a usage of waiver. It may be laid down as a general rule, that, though mere occasional indulgences of this kind by the insurer, are insufficient, yet such a course of dealing may be pursued as to establish a waiver, and whether it has been so pursued, is a question of fact in each case.[1]

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existing at the time of the renewal, or at the time of the original application, see § 27.

[1] This is the rule as laid down in Sweetser *v.* Odd Fellows' Mutual Aid Assoc., 117 Ind. 97, 101 (1888); (but see Franklin Co. *v.* Sefton, 53 Ind. 380, 388; 1876), and will, perhaps, harmonize most of the authorities, though some of them are apparently in conflict. Thus, the circumstance of giving days of grace in particular cases, was held insufficient as a waiver in other cases. Thompson *v.* (Knickerbocker) Co., 104 U. S. 252, 259 (1881); Lantz *v.* Vermont Co., 20 Atlantic Rep. 80 (Supm. Ct. Pa. (1891; acceptance in *three* previous instances, of overdue premiums, held not to establish such usage); Marston *v.* Massachusetts Co., 59 N. H. 92 (1879). To same effect seems Gaterman *v.* American Co., 1 Mo. App. 300 (1876). With these decisions, however, contrast Helme *v.* Philadelphia Co., 61 Pa. St. 107 (1869); Phœnix Mutual Co. *v.* Hinesley, 75 Ind. 1, 9 (1881). But, whatever may be the rule as laid down in the cases just cited, the rule as stated in the text, seems supported by the following authorities: Kenyon *v.* Knights Templar Assoc., 122 N. Y. 247, 262 (1890); Bosworth *v.* Western Mutual Aid Soc., 75 Iowa, 582 (1888); Thompson *v.* St. Louis Mutual Co., 52 Mo. 469 (1873); Lewis *v.* Phœnix Mutual Co., 44 Conn. 72, 89 (1876); Appleton *v.* Phœnix Mutual Co., 59 N. H. 541 (1880); Penn Mutual Co. *v.* Keach, 32 Ill. App. 427, 435; affirmed in 26 Northeastern Rep. 106 (Supm. Ct. Ill. 1890; receiving payment by note); Unsell *v.* Hartford Co., 32 Fed.

§ 101. **The same; waiver by accepting surrender of policy.** —Where the contract is evidenced by a policy, an acceptance by the insurer of a surrender of the policy, and issuing a new one in lieu thereof, is inconsistent with the position that the contract is at the time invalid; hence, such surrender operates as a waiver of forfeiture for nonpayment of premiums.[1] But one who repudiates such a surrender, cannot take advantage of it as a waiver,[2] and ordinarily, at least, he cannot take advantage of it as freeing him from liability to pay premiums subsequently accruing.[3] Otherwise his position with regard to the surrender would be an obviously inconsistent one.

Rep. 443 (1887); Spoeri *v.* Mass. Mutual Co., 39 Fed. Rep. 752 (1889); Cotton States Co. *v.* Lester, 62 Ga. 247 (1879); Alabama Gold Co. *v.* Garmany, 74 Ga. 51 (1884); Mobile Co. *v.* Pruett, 74 Ala. 487, 498 (1883); Mound City Mutual Co. *v.* Twining, 19 Kans. 349, 379 (1877); National Mutual Benefit Assoc. *v.* Jones, 84 Ky. 110 (1886); Girard Co. *v.* Mutual Co., 86 Pa. St. 236 (1878); so held in later decision, notwithstanding evidence of memorandum on the policy, that "all receipts of overdue premiums were acts of grace and courtesy" on the part of the insurer. 97 Pa. St. 15, 30 (1880). See further decision in 100 Pa. St. 172, 181 (1882). In Blakiston *v.* American Co., 15 Phila. (Pa.), 315 (1882), it was held not necessary to show that the insured adopted such usage. And in Tripp *v.* Vermont Co., 55 Vt. 100 (1882), that subsequent tender of the premiums was unnecessary after such waiver. So in Hanley *v.* Life Assoc. of America, 69 Mo. 380 (1879), as to failure to make tender after death of the insured. But in Bergmann *v.* St. Louis Co., 2 Mo. App. 262 (1876), the contract was held forfeited for failure to tender premium within reasonable time after day of payment. In National Mutual Benefit Assoc. *v.* Miller, 85 Ky. 88 (1887), the existence of such custom was held not to compel acceptance of a premium or assessment from the insured, if at the time his health was much impaired. See also, on the general subject, Illinois Masons' Soc. *v.* Baldwin, 86 Ill. 479, 487 (1877); Home Co. *v.* Pierce, 75 Ill. 426 (1874); Howell *v.* Knickerbocker Co., 44 N. Y. 276, 282 (1871).

[1] Garner *v.* Germania Co., 110 N. Y. 266, 271 (1888); Kantrener *v.* Penn Mutual Co., 5 Mo. App. 581 (1878).

[2] Whitehead *v.* N. Y. Co., 102 N. Y. 143, 153 (1886).

[3] So held where there was no fraud, and the person repudiating the surrender was not kept in ignorance of her rights, or prevented by any

§ **102. Effect of waiver under mistake of fact.**—Acts or omissions of the insurer that would ordinarily operate as a waiver of the violation of a condition in a contract, may fail to have such effect, where, at the time of such acts or omissions, the insurer is in ignorance of a material fact connected with the subject of the contract. This is merely an application of the general rule of relief against ignorance of fact. Such application to cases of waiver by the insurer, is commonly made in case of his ignorance of the fact of the violation of the condition, waiver of which is claimed.[1]

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act of the insurer from continuing her payments. Frank *v.* Mutual Co., 102 N. Y. 266, 278 (1886). So in case of a fraudulent surrender, where, however, it did not appear that the *insurer* was in any way connected with the fraud, or was guilty of any negligence. Schneider *v* U. S. Co., 123 N. Y. 109 (1890). Compare Whitehead *v.* N. Y. Co. note 2, p. 190.

[1] Thus in case of ignorance of the fact of violation. Robertson *v.* Metropolitan Co., 88 N. Y. 541 (1882); (Globe Mutual) Co. *v.* Wolff, 95 U. S. 326 (1877; violation of condition as to residence. S. P., Lorie *v.* Conn. Mutual Co., 4 Ins. L. J. 632; 1875); Bennecke *v.* Conn. Mutual Co., 105 U. S. 355 (1881; where violation of condition as to residence was held not waived by receipt of money for permit to reside beyond prescribed limits, such money being received in ignorance of the fact that the insured had died beyond such limits); Swett *v.* Citizens' Mutual Soc., 78 Me. 541 (1886; false statements as to age); Springmier *v.* Widows' & Orphans' Assoc., 5 Cin. L. Bull. 516 (1880). Seemingly to the contrary is Tobin *v.* Western Mutual Aid Soc., 72 Iowa, 261 (1887), where forfeiture for non-payment of assessments was held waived by receiving and retaining subsequent assessments, in ignorance of the previous non-payment. The decision can probably, however, be sustained on the ground of the *negligence* of the insurer in not informing itself of such non-payment.

So, forfeiture for non-payment of premium held not waived by subsequent acceptance of premium by the insurer in ignorance of fact that the insured had meanwhile died. Wyman *v.* Phœnix Mutual Co., 45 Hun, 184 (1887); Lewis *v.* Phœnix Mutual Co., 44 Conn. 72, 90 (1876); Mobile Co. *v.* Pruett, 74 Ala. 487, 498 (1883); Pritchard *v.* Merchants' & Tradesmen's Co., 3 C. B. N. S. 622 (1858); Miller *v.* Union Central

§ 103. Effect of receipt of premiums, as waiver of previous violation of conditions.—The fact of receipt of a premium being a recognition of the continuing validity of the contract, is inconsistent with the position that the contract is void for the previous violation of conditions,[1] such as de-

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Co., 110 Ill. 102 (1884); Bagley *v.* Grand Lodge A. O. U. W., 31 Ill. App. 618 (1889). So in case of false representations as to health. Harris *v.* Equitable Co., 3 Hun, 724; affirmed in 64 N. Y. 196 (1876). In Mutual Benefit Co. *v.* Robertson, 59 Ill. 123 (1871), the evidence was held insufficient to show such false representations. As to requirement of certificate of good health, as condition of renewal, see Rockwell *v.* Mutual Co. of Wisconsin, 20 Wis. 335 (1866); 21 Wis. 548 (1867); 27 Wis. 372 (1868); Servoss *v.* Western Mutual Aid Soc., 67 Iowa, 86 (1885); Unsell *v.* Hartford Co., 32 Fed. Rep. 443 (1887); Day *v.* Mutual Benefit Co., 1 MacArthur (D. C.), 598 (1874); Mutual Benefit Co. *v.* Higginbotham, 95 U. S. 380 (1877). The insurer held not bound by waiver of forfeiture for non-payment of premiums, where such waiver was conditional on the insured being of temperate habits and in as good health as at the time of the original contract, it appearing that such conditions were not fulfilled. Ronald *v.* Mutual Reserve Fund Assoc., 7 N. Y. Suppl. 153 (1889); 10 Id: 632 (1890). A renewal made with the understanding that the insured was then in good health, held valid, notwithstanding that in fact he had at the time received a mortal wound, it appearing that he acted in good faith. Campbell *v.* National Co., 24 Upper Canada C. P. 133 (1874).

As to duty of insurer to refund premium or assessment received by mistake, see Underwood *v.* Iowa Legion of Honor, 66 Iowa, 134 (1885); Bailey *v.* Mutual Benefit Assoc., 71 Iowa, 689 (1886); Lyon *v.* Supreme Assembly Royal Soc., 26 Northeastern Rep. 236 (Supm. Ct. Mass. 1891).

[1] Thus in case of violation of condition as to limits of residence. Wing *v.* Harvey, 5 DeGex, M. & G. 265 (1854); Walsh *v.* Ætna Co., 30 Iowa, 133, 142 (1870); Schmidt *v.* Charter Oak Co., 2 Mo. App. 339 (1876). So of condition against carrying on liquor business. McGurk *v.* Metropolitan Co., 56 Conn. 528 (1888). So of false statements in application. Masonic Mutual Assoc. *v.* Beck, 77 Ind. 203 (1881); Excelsior Mutual Assoc. *v.* Riddle, 91 Ind. 84 (1883); Excelsior Mutual Assoc. *v.* Beck, 91 Ind. 203 (1883); for instance, as to health. Ball *v.* Granite State Assoc., 64 N. H. 291 (1886); so as to age and health. Morrison *v.* Wisconsin Odd Fellows' Co., 59 Wis. 162, 169 (1884); so as to habits being temperate. Phœnix Co. *v.* Raddin, 120 U. S. 183, 194

fault in payment of premiums previously falling due,[1] and hence operates as a waiver of such violation. At least, this is so, in the absence of provision to the contrary, but, on general principles, if the premium is received in accordance with an understanding of the parties that it shall not operate to waive such violation, the rule is otherwise, and the violation is not waived.[2]

§ **104. Recovery back of premiums.**—Where the contract has once taken effect, there is ordinarily no rule of law to sustain the recovery back of premiums paid,[3] even though

(1887); Newman *v.* Covenant Mutual Assoc., 76 Iowa, 56 (1888). So of false statement that applicant was widow. Fitzpatrick *v.* Hartford Co., 56 Conn. 116, 131 (1888). See also, Cotten *v.* Fidelity & Casualty Co., 41 Fed. Rep. 506, 512 (1890); Armstrong *v.* Turquand, 9 Irish Common Law, 32 (1858); Matt *v.* Roman Catholic Protective Soc., 70 Iowa, 455, 460 (1886). In Fitzpatrick *v.* Hartford Co., above, the insurer, having before receiving the premium learned the true state of facts, was held presumed to be acquainted with the misstatement in the application, without its attention being specially called to it. In McGurk *v.* Metropolitan Co., above, although the insurer received the premium without actual knowledge of the violation of the contract, it was held bound by the *knowledge* of an agent who in the course of his duty collected the premiums, though the contract provided that agents had no authority to *waive* a forfeiture.

[1] Butler *v.* American Popular Co., 42 N. Y. Super. Ct. 342, 352 (1877); Piquenard *v.* Libby, 7 Mo. App. 565 (1879).

[2] Northwestern Mutual Co. *v.* Amerman, 119 Ill. 329 (1887). A by-law that if a member were in arrears when taken sick, he should not be entitled, by paying up his arrearages, to benefits during such sickness, held not waived by the acceptance of arrearages from such member. Nagel *v.* Glasburger, 10 N. Y. Suppl. 503 (1890).

[3] Thus, in Douglas *v.* Knickerbocker Co., 83 N. Y. 492, 499 (1881), the premiums already paid were held forfeited by the violation of certain conditions subsequent, though it was not expressly provided that such forfeiture should result from violation of such conditions, and it was so expressly provided as to the violation of certain other conditions, some of which were conditions precedent. And in case of an assignment invalid for want of insurable interest, the assignee cannot recover back from the insurer premiums or assessments paid. Knights & Ladies

the insurer attempt to declare a forfeiture.[1] On the other hand, where the contract has never taken effect, the premiums may be recovered back, in accordance with the general rules governing the recovery back of money paid.[2]

of Honor *v.* Burke, 15 Southwestern Rep. 45 (Ct. of App. of Tex. 1890). But in Prentice *v.* Knickerbocker Co., 77 N. Y. 483 (1879), an assignee of the contract was allowed to recover back premiums paid in mutual *ignorance of the fact* of the death of the insured. Recovery back of premiums paid in good faith was allowed, where the insurer had taken up the policy on the ground that it had been issued without an examination of the insured, who was, however, in no way responsible for there not having been an examination. Frain *v.* Metropolitan Co., 67 Mich. 527 (1887). An action to recover back premiums on the ground that the contract was procured by fraud, held not maintainable by the insured, who had merely paid the premiums, the contract being in the name of, and for the benefit of, other persons. U. S. Co. *v.* Wright, 33 Ohio St. 533 (1878); North America Co. *v.* Wilson, 111 Mass. 542 (1873). See, however, Venner *v.* Sun Co., 17 Canada Supm. Ct. 394, 402 (1889).

[1] Standley *v.* Northwestern Mutual Co., 95 Ind. 254, 258 (1883); Continental Co. *v.* Houser, 89 Ind. 258 (1883); 111 Ind. 266 (1887). To the contrary, True *v.* Bankers' Assoc., 47 Northwestern Rep. 520 (Supm. Ct. Wis. 1890). As to effect of contract being voidable at election of the insurer, see Low *v.* Union Central Co., 10 Am. L. Rec. (Cin. Ohio), 313 (1887). *A fortiori* the insurer is not bound to refund the premiums, where the contract is forfeited for a violation of its conditions by the *insured.* See Venner *v.* Sun Co., 17 Canada Supm. Ct. 394, 401 (1889).

[2] See Kabok *v.* Phœnix Mutual Co., 21 N. Y. State Reporter, 203, 208 (1889). Thus, where the contract never took effect, by reason of material misstatements by the applicant, made, however, without fraudulent intent, and under an innocent misapprehension as to their purport, he was allowed to recover back premiums paid. (Conn. Mutual) Co. *v.* Pyle, 44 Ohio St. 19 (1886). But an action to recover premiums paid, on the ground that the contract was invalid for want of insurable interest, was defeated on the ground of conduct of the plaintiff that created an estoppel. Lewis *v.* Phœnix Mutual Co., 39 Conn. 100 (1872). And defeated on the ground of the contract being a wagering one under the statute. Howard *v.* Refuge Friendly Soc., 54 L. T. R. 644 (1886). To the contrary, seems London & Lancashire Co. *v.* Lapierre, 1 Legal News (Canada), 506 (1878). But recovery back was allowed where the policy was invalid for omission to insert therein the name of the person inter-

ested, as required by statute. Dowker *v.* Canada Co., 24 Upper Canada, Q. B. 591 (1865). As to recovery back of premiums paid to a foreign insurance company that has not complied with statutory requirements before transacting business, see Leonard *v.* Washburn, 100 Mass. 251 (1868). One induced to insure by fraudulent representations on the part of the agent of the insurer, was allowed, on rescinding the contract, to recover back premiums from such agent. Hedden *v.* Griffin, 136 Mass. 229 (1884). As to conditions of recovery back of premiums from agent, see Farrow *v.* Cochran, 72 Me. 309 (1881). See also, as to right to recover back premiums on ground of invalidity of contract, McQuitty *v.* Continental Co., 15 R. I. 573 (1887).

CHAPTER VI.

DISCHARGE OF THE CONTRACT.

§ 105. Classes of events on the happening of which liability of insurer becomes consummated.—As we have seen, a contract of life insurance is a contract to pay on the happening of *an injury to life.*[1] Such injury is sometimes that total loss known as death, but it may also be what is commonly known as a *bodily injury* or an *injury to health.*[2] On the basis of this difference, the events on the happening of which the liability of the insurer becomes consummated, may be classified as *death*, *disability* and *sickness.*

§ 106. The same; death.—The question of the happening of the death of the insured is obviously one of fact,[3] and little, if any, scope is here furnished for judicial construction.[4]

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[1] See § 1.

[2] See § 2.

[3] In an action brought by the plaintiff in his individual character, and not as administrator, letters of administration granted by the proper probate court in a proceeding to which the insurer was a stranger, are not competent evidence to show death. Mutual Benefit Co. *v.* Tisdale, 91 U. S. 238 (1875). But in an action *as administrator*, the admissibility of such letters to show the plaintiff's capacity to sue, is not affected by the fact that they are inadmissible as evidence of the death of the insured. John Hancock Mutual Co. *v.* Moore, 34 Mich. 41 (1876). Testimony taken on a coroner's inquest, and offered to show means of death, held properly excluded, as being mere hearsay. Mutual Co. *v.* Schmidt, 8 Am. L. Rec. (Cin. Ohio), 629 (1880). So of records of city board of health. Buffalo Loan, &c., Co. *v.* Knights Templar Assoc., 9 N. Y. Suppl. 346 (1890). As to suicide, see § 44. As to evidence of death in case of disappearance, see Travelers' Co. *v.* Sheppard, 12 Southeastern Rep. 18 (Supm. Ct. Ga. 1890); John Hançock Mutual Co. *v.* Moore, 34 Mich. 41, 43 (1876); Tisdale *v.* Conn. Mutual Co., 28 Iowa, 12 (1869); Prudential Co. *v.* Edmonds, 2 L. R. App. Cas. 487 (1877); Doyle *v.* City of Glasgow Co., 53 L. J. Ch. 527 (1884). As to presumption of survivorship in case of death in a common calamity, see Cowman *v.* Rogers, 21 Atlantic Rep. 64 (Ct. of App. of Md. 1891).

[4] As to effect of insurance for 12 months, with provision for insurance against death occurring within 90 days, from the injury occasioning

§ 107. **The same; endowment insurance.**—Sometimes the contract to pay on the death of the insured is conjoined with a contract to pay on the expiration of a fixed period, should he live so long.[1] Such a contract is called a contract of *endowment insurance*, though, so far as concerns the contract to pay on the expiration of a fixed period, it is not, strictly speaking, a contract of *life insurance* at all.

§ 108. **The same; disability.**—Disability, as a condition on which the liability of the insurer becomes consummated, may, by the terms of the agreement, be limited to disability arising from injuries specified.[2] And when not thus limited, it is commonly limited to "*total*" disability.[3] Total

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the same, see Perry *v.* Provident Co., 99 Mass. 162 (1868); 103 Mass. 242 (1869).

[1] As, to pay a certain sum to the insured "on October 1, 1899, or, should he die before that time, then to" a beneficiary specified. Under an agreement to pay the insured at a time specified, "or to his children," the promise to his children was held only to apply in case he should die before the day of payment. Brigham *v.* Home Co., 131 Mass. 319 (1881). See also, as to endowment insurance, Levy *v.* Van Hagen, 69 Ala. 17 (1881).

[2] A statement in the contract that "permanent partial disablement" *implied* certain injuries specified, held not to prevent recovery as for "disablement" caused by other injuries not so specified. Scott *v.* Scottish Accident Co., 16 Scotch Session Cases, 4th series, 630 (1889). "Loss of two entire feet," held to cover case where injury to back paralyzed the lower part of the body, entirely destroying the use of both feet. Sheanon *v.* Pacific Mutual Co., 46 Northwestern Rep. 799 (Supm. Ct. Wis. 1890). "Total and permanent loss of the sight of both eyes," held to cover the loss of the only eye of the insured. Humphreys *v.* National Benefit Assoc., 20 Atlantic Rep. 1047 (Supm. Ct. Pa. 1891).

[3] The term "total disability," used without limitation, held to include total disability arising from old age. Dodds *v.* Canada Mutual Assoc., 19 Ontario Rep. 70 (1890). But the term "sick, lame or blind, or being otherwise disabled from work," held not to cover case of incapacity to work, arising from old age. Dunkley *v.* Harrison, 56 L. T. R. 660 (1887). Recovery as for total disability cannot be allowed, where it does not appear that the insured would have been totally disabled, had it

disability must of necessity be a relative matter, depending largely upon the occupation and employment of the insured.[1] In the absence of agreement to the contrary, it seems to be the rule, that such disability consists in a total inability to earn a livelihood at *any* employment, and to be not restricted to a particular employment, or that in which the insured is engaged at the time of the injury.[2] But it is also reasonably held that, to constitute total disability to labor, it is not necessary that the insured be incapacitated to do *anything* in the prosecution of a given employment,

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not been for an injury subsequent to that for which recovery is sought. Rhodes *v.* Railway Passenger Co., 5 Lans. 71, 77 (1871).

A provision for indemnity against loss of time in a certain sum per week during a specified period of *disability to work*, held not to admit of recovery by the representative of the insured for damages for injury causing *instant death*. Dawson *v.* Accident Co. of No. America, 38 Mo. App. 355 (1889).

[1] For applications of the doctrine to various employments, see Wolcott *v.* United Assoc., 55 Hun, 98 (1889; physician); Neafie *v.* Manufacturers' Accident Co., 55 Hun, 111 (1889; "iceman, proprietor"); Hooper *v.* Accidental Death Co., 5 Hurlst. & N. 546 (1860; solicitor).

The insured held properly allowed to testify as to his ability to labor after the injury. Lyon *v.* Railway Passenger Co., 46 Iowa, 631, 636 (1877).

[2] Baltimore & Ohio Employees' Relief Assoc. *v.* Post, 122 Pa. St. 579, 600 (1888). The insured being described as "leather cutter and merchant," held that he must show disability in both capacities, to recover benefits. Ford *v.* U. S. Mutual Accident Assoc., 148 Mass. 153 (1889). The expression "totally disabled, and prevented from the transaction of all kinds of business," held not to be construed to mean "partially disabled from some kinds of business." Lyon *v.* Railway Passenger Co., 46 Iowa, 631 (1877). As to effect of provision that, in case of accidental injuries to the insured that should "*wholly disable* and prevent him from the prosecution of *any and every kind* of business pertaining to his occupation," he should be indemnified against loss of time thereby "for such period of continuous total disability," see Saveland *v.* Fidelity & Casualty Co., 67 Wis. 174 (1886). Or that should render him "helpless to the extent of permanently preventing him from following any occupation whereby he or she can obtain a livelihood," Albert *v.* Order Chosen Friends, 34 Fed. Rep. 721 (1887).

but only that he be incapacitated to do all the substantial acts necessary to the prosecution of such employment.[1]

§ 109. **The same; sickness.**—Sickness, as a condition on which the liability of the insurer becomes consummated, excludes the idea of any mere bodily injury, though permanent, that does not affect the general health.[2] It is in contracts of mutual benefit insurance that provisions for payment in case of sickness, or, as it is commonly expressed, for payment of "sick benefits," are most commonly to be found.[3] As in case of death, the question of the happening of sickness is obviously one of fact.

§ 110. **Dividends and profits.**—Besides the provision for payment by the insurer on the happening of the event on which the liability of the insurer becomes consummated, provision is sometimes made for appropriation for the benefit of the insured, of dividends or profits from the business conducted by the insurer.[4] This is commonly

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[1] Young *v.* Travelers' Co., 80 Me. 244 (1888). Thus, the question whether one is "incapable of working," so as to be entitled to benefits, was held one of fact. And held that at any rate it will not be held as a matter of law that he is not so incapable, though it appear that he has done *some* work. Genest *v.* L'Union St. Joseph, 141 Mass. 417 (1886).

[2] Kelly *v.* Ancient Order of Hibernians, 9 Daly, 289 (1880).

[3] In such a contract *insanity* held included under term "sickness." Burton *v.* Eyden, 8 L. R. Q. B. 295 (1873). So under term "sickness or other disability." McCullough *v.* Expressmen's Assoc., 133 Pa. St. 142 (1890).

[4] As to effect of such provisions with reference to the duty to pay premiums, see § 92. In case of a provision that the policy was issued on the "reserve dividend plan," and that the insurer would at the expiration of a certain period pay its equitable proportion of the "reserve dividend fund" in cash, held that the meaning of the terms quoted must be ascertained by recourse to contemporaneous insurance literature. Fuller *v.* Metropolitan Co., 37 Fed. Rep. 163 (1889).

In Hale *v.* Continental Co., 12 Fed. Rep. 359 (1882), a suit was held maintainable to take an account of the profits to which the insured was

done in what is known as a *tontine policy*, wherein provision is made for the distribution of such profits at the expiration of a specified period.[1]

§ 111. **Cancellation or substitution of contract by mutual consent.**—Obviously, by agreement between the parties, the original contract may be cancelled prior to the happening of the event on which the liability of the insurer is to become consummated. Where the contract is evidenced by a policy or certificate, such transaction of cancellation is commonly known as a *surrender* of the policy or certificate.[2] The surrender may be for a sum of money or

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entitled under the contract. But the right to maintain a proceeding in equity, to determine whether the directors of the insuring company had properly exercised their discretion in respect to the time of dividing profits, was denied, in the absence of allegation or proof that they had improperly refused to exercise such power, or had exercised it wrongfully or fraudulently. Hudson *v.* Knickerbocker Co., 28 N. J. Eq. 167 (1877). This was, however, a case of a foreign company. See also, as to agreements for dividends or profits, Bruce *v.* Continental Co., 58 Vt. 253 (1885).

[1] The nature of *tontine policies* was considered and their validity sustained, in the following authorities. As with contracts of insurance generally (see § 7), the relation of a tontine policy-holder to the insurer is that of a *creditor*, not of a *cestui que trust*. See Bogardus *v.* N. Y. Co., 101 N. Y. 328 (1886); Uhlman *v.* N. Y. Co., 109 N. Y. 421 (1888); Avery *v.* Equitable Soc., 117 N. Y. 451 (1889); Pierce *v.* Equitable Soc., 145 Mass. 56 (1887). Thus, in Uhlman *v.* N. Y. Co., a suit for an accounting by the insurer as trustee, at the end of the tontine period, so called, was held not maintainable, in the absence of evidence of fraud, mistake, or impropriety on the accounts, or in the manner of their statement, or in the result attained. Compare Fuller *v.* Knapp, 24 Fed. Rep. 100 (1885).

[2] In Tabor *v.* Michigan Mutual Co., 44 Mich. 324 (1880), a suit in equity was sustained to obtain the re-establishment of a policy, the surrender of which had been procured by fraud.

As to effect of surrender in violation of the rights of the beneficiary, see §§ 74, 78. The remedy against the insurer, of a beneficiary claiming that her certificate had been surrendered in contravention of her rights, held by an action at law on the certificate, not by a proceeding in equity to

other valuable consideration. Sometimes another policy or certificate is substituted for the one surrendered.[1] Although, as before stated, such surrender may be made by agreement between the parties, whatever were the terms of the original contract, yet it is sometimes made in pursuance of an agreement contained in the original policy or certificate.[2]

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enjoin collection from the insurer by a substituted beneficiary. Beatty's Appeal, 122 Pa. St. 428 (1888).

As to liability of one who has received surrender value as guardian, see Waldrom *v.* Waldrom, 76 Ala. 285 (1884).

[1] See also, as to paid-up policies, § 84. The surrender of an existing policy held a sufficient consideration for issuing a new one, and, in an action on the new one, the fact that the last premium due on the surrendered one was never paid, held immaterial. Kantrener *v.* Penn Mutual Co., 5 Mo. App. 581 (1878). Where a policy containing no warranty was exchanged for one containing a warranty, there being, however, no new consideration for the second policy, and no new application or examination, held that no new condition of warranty could be imported into it. Klaiber *v.* Illinois Benev. Masonic Soc., 12 Ins. L. J. 125 (1883). In Windus *v.* Lord Tredegar, 15 L. T. R. 108 (1866), the evidence was held insufficient to show that a policy was a continuation of one previously taken out. As to recovery on contract substituted for one that has become void for non-payment of premiums, see Winchester *v.* Stebbins, 16 Gray (Mass.), 52 (1860).

[2] A provision in a policy that it would "be good at any time after three payments, for its equitable value," was held to simply continue the policy in force for that amount on default in payment of premiums, but to impose no obligation on the insurer to pay anything until the death of the insured. Andrews *v.* Ætna Co., 92 N. Y. 596, 602 (1883).

A provision that "in case the holder of this policy wishes to cancel it after three annual premiums have been paid, a fair proportion of the premiums will be returned, if applied for before the policy has expired," held valid and not uncertain. Hayward *v.* Knickerbocker Co., 12 Daly, 42 (1883; holding admissible, extrinsic evidence of the surrender value; also that the insured was not estopped from urging his claim, by continuing during the action to pay the premiums). See also, as to measure of damages for breach of this agreement, Knickerbocker Co. *v.* Heidel, 8 Lea (Tenn.), 488 (1881).

As to right of the insurer to change terms of the contract with refer-

§ 112. Effect of provisions for extra-judicial determination of liability of insurer.—Obviously, in case of a disagreement between parties to a contract, as to the nature or amount of the liability created thereby, such disagreement is, at least in the absence of agreement to the contrary, a proper subject of judicial determination.[1] But frequently provision is, by the terms of the agreement itself, made for an *extra-judicial* determination of such liability, that is to say, for a determination by some person or body of persons without judicial authority (save so far as such authority may be

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ence to surrender, see Allen *v.* Life Assoc. of America, 8 Mo. App. 52 (1879). In a peculiar and obscurely reported decision, the right of a company doing business on the mutual plan, to alter, by arrangement with the insured, the terms of a provision for surrender, seems to have been denied on the ground that such change "would be a fraud upon every individual holding a policy in the company"! Clevenger *v.* Mutual Co. (of N. Y.), 2 Dakota, 114, 124 (1878). Here the court lay down the remarkable proposition that the company in question could not "lawfully contract with a particular person taking insurance, on a different plan or basis than applies to all others."

As to suit to ascertain the surrender value of a policy, alleging that the principles and methods of apportionment made by the insurer of its surplus funds, fail to award to complainant's policy the amount equitably due to it, see Kellner *v.* Mutual Co., 43 Fed. Rep. 623, 626 (1890). By statute in New York (L. 1879, c. 347), provision is made for a surrender value of policies that, after being in force for three years, become forfeited for non-payment of premiums. So by statute in Massachusetts (L. 1887, c. 214, § 76), after payment of two annual premiums. See note 4, p. 150.

[1] So, where there was no provision for a decision of the questions involved, by the officers of the insurance society, or by any other tribunal. Dolan *v.* Court Good Samaritan, 128 Mass. 437 (1880). And a by-law merely giving the *right of* appeal to a superior body, of which the insurer was a member, was held not sufficient to take away the right to resort directly to the courts, without taking such appeal. Bauer *v.* Samson Lodge Knights of Pythias, 102 Ind. 262 (1885). As to recovery of benefits from unincorporated association, under Pennsylvania statute, see Paul *v.* Keystone Lodge, 3 W. N. C. 408 (1877); Luders *v.* Volp, 8 W. N. C. 417 (1880); Kurz *v.* Eggert, 9 W. N. C. 126 (1880).

supposed to be created by the agreement itself). Obviously, such provisions may be contained in any contract of life insurance,[1] but practically they are rarely found save in contracts of mutual benefit insurance, and even then they are usually confined to the determination of the liability to pay "sick benefits." This naturally arises from the circumstance that, as compared with cases of death or disability, the question whether or not in a given case the insured is sick, is frequently difficult to determine as a matter of fact. It is commonly some officer or official body of the insuring society, that is selected as such extra-judicial tribunal. That the insured, in order to enforce the liability of the insurer in such case, is bound to conform to the provisions prescribed for obtaining a determination by the tribunal prescribed, seems universally agreed.[2] In the

[1] Thus, in Braunstein *v.* Accidental Death Co., 1 Best & Smith, 782 (1861), the contract was such that a reference to a third person to ascertain the amount due, was held a condition precedent to maintaining the action.

[2] Thus, under a provision that the trustees of the society should examine all claims for sick benefits, and, if found correct, order the same to be paid, an action for benefits was held not maintainable till after the trustees had been given an opportunity to examine the claims. Robinson *v.* Irish-American Benev. Soc., 67 Cal. 135 (1885). To similar effect, Harrington *v.* Workingmen's Benev. Assoc., 70 Ga. 340 (1880). And the duty of a member of a benefit society to make application for benefits in the manner prescribed by the contract, was also asserted in Breneman *v.* Franklin Beneficial Assoc., 3 Watts & S. (Pa.), 218 (1842); Bauer *v.* Samson Lodge Knights of Pythias, 102 Ind. 262 (1885). Thus, he must exhaust his right of appeal. Poultney *v.* Bachman, 31 Hun, 49, 54 (1883); Supreme Council Chosen Friends *v.* Forsinger, 25 North-eastern Rep. 129 (Supm. Ct. Ind. 1890). But where the only right of appeal with respect to a claim for sick benefits, was from the decision of the supreme medical officer of the society, the refusal of the officer of the local branch to which the insured belonged, to certify to his claim, the justice of which was not questioned, thereby preventing him from presenting it to the supreme medical officer for decision, in the manner required by the laws of the society, the remedy of the insured within the order was held exhausted, so that he might resort to the courts to

absence of any provision making such *extra-judicial determination* conclusive, the proper rule would seem to be, that the parties are not precluded from thereafter seeking a *judicial determination* of the same questions passed upon by the *extra-judicial* tribunal, in other words, are not precluded from resorting to the courts.[1] In such case the question for judicial determination is, generally speaking, whether the extra-judicial determination was in accordance with the provisions of the contract.[2] But if the contract

enforce his claim. Supreme Sitting Order of Iron Hall *v.* Stein, 120 Ind. 270 (1889).

[1] See Bauer *v.* Samson Lodge, note 2, p. 206; Albert *v.* Order of Chosen Friends, 34 Fed. Rep. 721, 724 (1887). The insured was held bound by the decision of a tribunal of the society, that he was not entitled to benefits, even in the absence of any express provision making such decision conclusive upon him. Black & Whitesmiths' Soc. *v.* Vandyke, 2 Wharton (Pa.), 309 (1837); Osceola Tribe *v.* Schmidt, 57 Md. 98 (1881). And so, it seems, Fritz *v.* Muck, 62 How. Pr. 69 (1881). And see Poultney *v.* Bachman, 31 Hun, 49, 54 (1883); Dolan *v.* Court Good Samaritan, 128 Mass. 437 (1880). But these decisions are probably opposed to the spirit, if not the letter, of the authorities generally, in which it seems *assumed*, even when not so expressly declared, that, to make such extra-judicial determination conclusive, there must be an express agreement to that effect. See cases cited in note 2, below, and note 2, p. 206.

[2] Thus the question has frequently arisen, whether forfeiture of benefits, in accordance with a by-law, was not illegal, as being in violation of the contract. By-laws imposing forfeiture of benefits in case of sickness were, under varying circumstances, declared legal in Fugure *v.* Mutual Soc. of St. Joseph, 46 Vt. 362 (1874); McCabe *v.* Father Matthew Soc., 24 Hun, 149 (1881); Poultney *v.* Bachman, 31 Hun, 49 (1883; where plaintiff fell sick before suspension of by-law); Skelly *v.* Private Coachmen's Soc., 13 Daly, 2 (1884); St. Patrick's Male Beneficial Soc. *v.* McVey, 92 Pa. St. 510 (1880); Stohr *v.* Musical Fund Soc., 82 Cal. 557 (1890). See St. Mary's Soc. *v.* Burford, 70 Pa. St. 321 (1872); Frey *v.* Fidelity Lodge K. of P., 6 Pa. Co. 435 (1889).

But a by-law imposing forfeiture of benefits in case of sickness was, under the circumstances, declared illegal. Cartan *v.* Father Matthew United Soc., 3 Daly, 20 (1869). An amendment of the articles of association, depriving of benefits, construed as not retroactive. Gundlach

provides that such judicial determination shall be conclusive, and preclude the parties from resorting to the courts, then the question arises whether, after the insured has conformed to all of such provisions, and the ultimate determination of the tribunal is adverse to him, he is precluded from seeking a *judicial determination* of the liability of the insurer, that is to say, from resorting to the courts. This is a question belonging to the general law of contracts, and, in its general aspect, is beyond the scope of our subject;[1] but so far, at least, as concerns insurance contracts, the weight of authority seems to support the proposition that such extra-judicial determination precludes a subsequent resort to the courts.[2]

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v. Germania Mechanics' Assoc., 4 Hun, 339 (1875). See Coyle *v.* Father Matthew Soc., 17 N. Y. Weekly Digest, 17 (1883); Stohr *v.* San Francisco Musical Fund Soc., 82 Cal. 557 (1890).

[1] See Wald's Pollock on Contracts, p. 291.

[2] Thus, where a benefit association was, under its fundamental law, bound to pay benefits only when "in funds," held that the insured was bound by the determination of the association that it was not in funds. Toram *v.* Howard Beneficial Assoc., 4 Pa. St. 519 (1846). So, under a by-law providing for a "sick committee" to "investigate and determine" whether a member was entitled to a sick benefit, and that they should be the only and final deciders thereof, their decision that he was not entitled to benefits, held final. Van Poucke *v.* St. Vincent de Paul Soc., 63 Mich. 378 (1886). So the insured was, in accordance with the provisions of the contract, held concluded by the decision of the tribunal of the insuring society, in Rood *v.* Railway Passenger Co., 31 Fed. Rep. 62 (1887); Anacosta Tribe *v.* Murbach, 13 Md. 91 (1858); Cincinnati Lodge *v.* Littlebury, 6 Cin. L. Bull. 237 (1880). See Matoon *v.* Wentworth, 4 Id. 513 (1879). But, contrary to the doctrine of the cases cited above, it was held that the insured could not, by any provision of the contract, be precluded from resorting to the courts. Bauer *v.* Samson Lodge Knights of Pythias, 102 Ind. 262 (1885); Supreme Council Chosen Friends *v.* Garrigus, 104 Ind. 133, 138 (1885); Supreme Council Chosen Friends *v.* Forsinger, 25 Northeastern Rep. 129 (Supm. Ct. Ind. 1890); or by custom, Bauer *v.* Samson Lodge (p. 271), above. "Claims for money due by virtue of an agreement are unlike mere matters of discipline, questions of doctrine or of policy, and are not governed by the same rules." Bauer *v.* Samson Lodge (p. 268), above.

§ 113. Necessity of notice or preliminary proofs of loss.— In the absence of provision for furnishing notice or proofs of the loss (or injury) insured against, it is not necessary to furnish either such notice or proofs, as a condition of enforcing the liability of the insurer. But the furnishing of such notice or proofs, or both, is frequently made, by the terms of the contract, a condition precedent to the liability of the insurer, as in case of the common provision to pay within a specified time after notice and proof of loss.[1] Whether the furnishing of such notice or proof is a condition precedent to the liability of the insurer, must in each case depend on the provisions of the contract in question.[2]

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[1] Under promise to pay "within 60 days after due notice and proof of death," allegation and proof that such notice and proof were given, held conditions precedent to recovery on the contract. Jackson *v.* Southern Mutual Co., 36 Ga. 429 (1867); so under promise to pay "90 days after due proof and approval of the death." Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 667 (1885). As to sufficiency of pleading in such case, see National Benefit Assoc. of Indianapolis *v.* Grauman, 107 Ind. 288 (1886). But a mere promise to pay within a specified time after notice and proof of (interest and) loss, was held *not* to make the furnishing of such notice or proof a condition precedent to recovery on the contract. Hincken *v.* Mutual Benefit Co., 6 Lans. 21 (1872); affirmed without opinion in 50 N. Y. 657 (1872). Compare Coburn *v.* Travelers' Co., 145 Mass. 226 (1887).

As to change in by-law of benefit society, respecting length of such specified time, see Morrison *v.* Wisconsin Odd Fellows' Co., 59 Wis. 162 (1884).

Such a provision is simply for the benefit of the insurer. Thus, after notice, the insurer is not bound to wait the whole of the specified time, before making payment, in order to give possible claimants opportunity to make known their claims. Home Mutual Assoc. *v.* Seager, 128 Pa. St. 533, 543 (1889). On the other hand, under such a provision, waiver of proofs does not create a liability to pay prior to the expiration of the specified time. McConnell *v.* Iowa Mutual Aid Assoc., 79 Iowa, 757, 761 (1889).

As to evidence as to furnishing proof, see Ætna Co. *v.* Deming, 123 Ind. 384, 391 (1890).

[2] Thus, under a requirement that the injury for which recovery is

§ 114. **Requisites of notice and proofs.**—Notice and proof are obviously distinct in character, and a condition requiring both is not satisfied by giving notice merely.[1] Nor does the insurer waive the condition as to proof, by failing to give notice that the notice furnished is not proof.[2] Such proof is commonly contained in blanks furnished to the claimant for that purpose. Under a general requirement of proof or notice, it is not practicable to lay down other than a very general rule as to their sufficiency; but as to the proof, it may doubtless be safely said, that it involves the idea of evidence in some form—such form as is usual and customary in such cases, or as is recognized by law, and is calculated to persuade the mind of the truth of the fact alleged.[3] It is not necessary, however, that the

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allowed must "be caused by some outward and visible means, of which proof satisfactory can be furnished," it is not requisite to make and present proofs, as an act precedent to the right to recover, it being sufficient that such proof is made on the trial of the cause. Railway Passenger Co. *v.* Burwell, 44 Ind. 460 (1873). See also, as to necessity of pleading proof of loss, Taylor *v.* National Temperance Union, 94 Mo. 35, 42 (1887).

[1] O'Reilly *v.* Guardian Mutual Co., 60 N. Y. 169 (1875).

[2] O'Reilly *v.* Guardian Mutual Co., above.

[3] Held that a notice of death might refer, for proof of the death, to affidavits filed with the insurer by the holder of another policy on the same life. Loomis *v.* Eagle Co., 6 Gray (Mass.), 396 (1856). So, where the insurer had entered into two contracts of insurance on the life of the same person, both calling for the same mode of proof of death, and accepted without objection proofs of death under one contract, it was held not requisite, in the absence of special provisions, to furnish further proof under the other, in order to recover thereon. Girard Co. *v.* Mutual Co., 97 Pa. St. 15 (1881).

A discrepancy of one year in stating the age of insured in the proofs of death, held not to so mislead or injure the insurer as to prevent recovery on the contract. Neill *v.* American Popular Co., 42 N. Y. Super. Ct. 259 (1877). And a notice held not vitiated by an honest mistake as to the date of the injury. Young *v.* Travelers' Co., 80 Me. 244, 250 (1888).

As to compliance with requirement that proof of loss be "direct

facts and circumstances of the loss or injury be set forth,[1] and it is clear that the insurer cannot arbitrarily determine the sufficiency of such proof.[2] Nor does it derogate from the sufficiency of the proof, that it discloses facts of which the insurer might avail itself as a defense to an action on the contract.[3] But in addition to the general requirement of proof, it is obvious that the contract may contain conditions as to furnishing particular elements of proof,[4] as

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and affirmative," see Travelers' Co. *v.* Sheppard, 12 Southeastern Rep. 18, 22 (Supm. Ct. Ga. 1890).

A requirement of notice of the "just *claim* of the assured," held to refer to her claim or title to the policy, and not to the justness of her cause of action thereon. (Charter Oak) Co. *v.* Rodel, 95 U. S. 232 (1877). See also, as to evidence of compliance with requirement of "due proof of the just claim of the assured," (Manhattan) Co. *v.* Francisco, 17 Wall. 672 (1873).

See also, as to sufficiency of proofs of loss, Flynn *v.* Mass. Benefit Assoc., 25 Northeastern Rep. 716 (Supm. Ct. Mass. 1890). As to pleading defects in such proofs, see Coburn *v.* Travelers' Co., 145 Mass. 226 (1887); Knickerbocker Co. *v.* Schneider, 25 U. S. Supm. Ct. Rep., Law. ed. 694 (1880).

[1] Bentz *v.* Northwestern Aid Assoc., 40 Minn. 202, 206 (1889).

[2] So, even where the requirement was of "*satisfactory*" proofs. Bentz *v.* Northwestern Aid Assoc., above; Supreme Council Chosen Friends *v.* Forsinger, 25 Northeastern Rep. 129 (Supm. Ct. Ind. 1890; where, under provision for payment "upon the receipt and approval of satisfactory proofs," it was held not necessary for the claimant to allege that his proofs were such as satisfied the insurer, it being sufficient to allege that he had made proper proofs). Under a provision for furnishing "proof satisfactory," besides "such further evidence or information, if any, as the directors shall think necessary to establish" the claim, held that the directors could not arbitrarily refuse to be satisfied with reasonable evidence. Braunstein *v.* Accidental Death Co., 1 Best & Smith, 782 (1861).

[3] (Charter Oak) Co. *v.* Rodel, 95 U. S. 232, 237 (1877); Bentz *v.* Northwestern Aid Assoc., 40 Minn. 202, 206 (1889); Conn. Mutual Co. *v.* Siegel, 9 Bush (Ky.), 450 (1872).

[4] A provision that the insurer would pay the amount insured, if, in the opinion of its surgeon-in-chief, the insured did not die of intemperance, sustained as making the obtaining of such opinion a condition

the name of the attending physician of the insured,[1] or a physician's certificate of the death (in case of a death claim).[2]

§ 115. **Time within which notice or proofs must be furnished.** —It is clear that the provisions of the contract may be such, that furnishing notice or proofs within a specified time, is a condition precedent to enforcing the liability of the insurer, and that therefore failure to give such notice or proofs within such time, will avoid the contract.[3] Whether such is the effect, depends in each case on the provisions of the contract in question.[4] But it is common to provide,

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precedent to recovery. Campbell *v.* American Popular Co., 1 MacArthur (D. C.), 246 (1873); Id. 471 (1874).

[1] Under a provision that the proofs should contain the name of the attending physician, a personal friend of the deceased, who had been a practicing physician, but who for some years had not been in practice, held not an attending physician. Gibson *v.* American Mutual Co., 37 N. Y. 580 (1868).

[2] Though such a certificate is not essential, unless expressly required by the contract. Taylor *v.* Ætna Co., 13 Gray (Mass.), 434 (1859).

[3] Thus, the contract was avoided by failure to give notice within *seven aays*, as required by the contract. Cawley *v.* National Employers' Assoc., 1 Cababe & Ellis, 597 (1885); and so held, though, owing to the sudden character of the accident, and its resulting in instantaneous death, there was no one capable of giving such notice. Gamble *v.* Accident Co., 4 Irish Rep. (Com. L.), 204 (1869). To similar effect, Patton *v.* Employers' Liability Co., 20 L. R. (Irish), 93 (1887). And ordinarily, at least, no *equitable* relief will be granted against a forfeiture for such failure. Winchell *v.* Hancock Mutual Co., 7 Reporter, 549 (1879).

Proof that on the back of the proofs of loss were endorsed the words, "received Sept. 15, 1881," held sufficient to sustain a finding that such proofs were then received. Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 643 (1885).

[4] Thus, a provision that such notice should be given within seven days, was held, in view of the other provisions of the contract, not to create a condition precedent to recovery. Stoneham *v.* Ocean, &c., Accident Co., 19 L. R. Q. B. D. 237 (1887).

not that the notice shall be given within any specified time, but that it shall be "immediate."[1] So far as a judicial construction has been put upon the word "immediate," it has been held to mean within a reasonable time after the loss.[2] But, generally speaking, the question whether this provision has been complied with, that is to say, whether, under all the circumstances, the notice was given within a reasonable time after the loss, is one of fact,[3] though the delay may be so great that it may be ruled, as a matter of law, that the notice was not given within a reasonable time.[4] What has been said of the effect of the word "immediate," will apply to equivalent expressions, as for instance, "as soon as possible" after the loss.[5]

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[1] As to the contract being avoided for failure to give notice under such a provision, see Lyon *v.* Railway Passenger Co., below.

[2] People's Mutual Accident Assoc. *v.* Smith, below; Lyon *v.* Railway Passenger Co., below.

[3] Thus, held that a delay of *twenty-seven* days could not, as a matter of law, be considered not immediate. People's Mutual Accident Assoc. *v.* Smith, 126 Pa. St. 317 (1889). So of a delay of *thirty-one* days. Lyon *v.* Railway Passenger Co., 46 Iowa, 631, 635 (1877). The question whether notice of death was given within a reasonable time, held for the jury. Southern Co. *v.* Wilkinson, 53 Ga. 535, 548 (1874).

[4] Thus, a delay of *six* days only was held, as a matter of law (sustaining demurrer to complaint), not immediate, where it appeared that the insurer had an agent in the place where the insurance was effected and the insured resided, and where the injury happened, and no circumstances were stated to excuse the delay. Railway Passenger Co. *v.* Burwell, 44 Ind. 460 (1873). And here it was held error to charge the jury that they might consider circumstances excusing the delay in giving notice, where no such matters of excuse were proved.

[5] Under this condition, held that the question whether notice was given in proper time, was properly left to the jury. Provident Co. *v.* Martin, 32 Md. 310, 315 (1869). And so held, though it appeared that the notice was not given for eight or ten days after the loss, it appearing, however, that the insured, who gave the notice, did so immediately upon discovering such condition in the policy, and that the company gave him a blank form of notice, without objection as to time. Provident Co. *v* Baum, 29 Ind. 236 (1867).

§ 116. **By whom notice or proofs may be given.**—On general principles of the law of agency, a person cannot, even by ratification, take advantage of notice or proofs not given in his behalf.[1] Yet the tendency is to readily seize upon circumstances, to avoid the application of a rule that so obviously tends to produce a forfeiture of the contract.[2] Of course, such notice or proofs may be furnished by the authorized agent of the person seeking to take advantage of them.[3]

§ 117. **To whom notice or proofs may be given.**—In the absence of provision in the contract as to whom to send or deliver the notice or proofs, it is undoubtedly the duty of the claimant to seek out some one having authority to receive them, either at the home office of the insurer or elsewhere. Sometimes, however, it is provided by the contract to whom to send the notice or proofs.[4]

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[1] Wuesthoff *v.* Germania Co., 52 N. Y. Super. Ct. 208 (1885).

[2] Thus, in 107 N. Y. 580, 592, reversing Wuesthoff *v.* Germania Co., above, held that a guardian, though without power to interfere with the ward's estate before giving security, could yet, in the interest of the ward, give such notice. So, in Delamater *v.* Prudential Co., 24 N. Y. State Reporter, 98 (1889), the husband of the insured was allowed, as her administrator, to take advantage of proofs of loss that he had given as husband merely.

[3] The rule as to the effect of an *agent of the insurer* inserting statements in the application, at variance with those made by the applicant (see § 21), applies to statements in the notice or proofs of loss. Young *v.* Travelers' Co., 80 Me. 244, 249 (1888).

As to duty of subordinate lodge of benefit society to furnish proofs of loss to the supreme lodge, see Lorscher *v.* Supreme Lodge Knights of Honor, 72 Mich. 316, 329 (1888). In Millard *v.* Legion of Honor, 81 Cal. 340, 348 (1889), the contract was held such that the subordinate lodge, not the member, was bound to furnish the proofs.

[4] The provisions of the contract held such that, though *notice* of the loss was required to be sent to the home office of the insurer, the *proofs* were not required to be sent there or to any other particular place. Scheiderer *v.* Travelers' Co., 58 Wis. 13 (1883).

A condition for furnishing proofs of loss to the secretary of a benefit

§ 118. Waiver of sufficiency of such notice or proofs.— In accordance with the general principles regulating waiver, the conduct of the insurer may be such as to preclude it from raising the objection that the notice given or proofs furnished were insufficient,[1] or even that such notice was not given, or that such proofs were not furnished. As in case of waiver generally, the waiver of sufficiency of the notice or proofs may be evidenced in infinitely numerous ways,[2] as, for instance, by retaining the proofs without ob-

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association, held satisfied by furnishing proofs to the association itself. Excelsior Mutual Aid Assoc. *v.* Riddle, 91 Ind. 84 (1883).

[1] If it is shown that proofs of loss have been given, it will be presumed that they were sufficient, if the insurer, having them in its possession, fail to account for or produce them. Hincken *v.* Mutual Benefit Co, 50 N. Y. 657 (1872). See Buffalo Loan, &c., Co. *v.* Knights Templar, &c., Assoc., 56 Hun, 303 (1890). In McComas *v.* Covenant Mutual Co., 56 Mo. 573, 576 (1874), under a provision that the amount should be paid in 60 days after notice and proof of loss, such notice and proof being waived, held that the amount was due 60 days after the loss. And in Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 644 (1885), the opinion was expressed, that the refusal to pay enabled an action to be brought even before the expiration of the time limit, on the general ground of liability for anticipatory refusal to perform a future act.

[2] Goodwin *v.* Mass. Mutual Co., 73 N. Y. 480, 493 (1878); Prentice *v.* Knickerbocker Co., 77 N. Y. 483, 489 (1879); Reynolds *v.* Equitable Assoc., 17 N. Y. State Reporter, 337 (1888); Bushaw *v.* Women's Mutual Co., 8 N. Y. Suppl. 423 (1889); Jennings *v.* Metropolitan Co., 148 Mass. 61 (1888); Girard Co. *v.* Mutual Co., 97 Pa. St. 15, 24 (1881); Suppiger *v.* Covenant Mutual Assoc., 20 Bradw. (Ill.), 595, 600 (1886); Cotton States Co. *v.* Edwards, 74 Ga. 220, 230 (1884); Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 643 (1885). And the rule is equally applicable to insufficiency of *notice* of loss. Unthank *v.* Travelers' Co., 4 Bissell, 357 (1869).

A condition requiring proofs of death to be presented within twelve months, held waived in case of an assignee of the contract, who went abroad relying on the assurances of a general agent that the insurer would know of the death of the insured, if it occurred, and that all would be right; and where the insurer kept the proofs of death when presented, for three months without objection, and without offering to return the

jection,[1] or by refusing on a distinct ground to pay the amount insured,[2] or by refusal to furnish the customary blanks used for preparing the proofs.[3] Or the waiver may

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premiums paid after the death of the insured. Prentice *v.* Knickerbocker Co., 77 N. Y. 483 (1879).

Waiver of proof may be proved under an allegation that proof was given. American Co. *v.* Mahone, 56 Miss. 180, 188 (1878). A letter offering to compromise, but containing a waiver, held admissible in evidence, not to prove the offer, but to establish the waiver. Unthank *v.* Travelers' Co., 4 Bissell, 357 (1869). So, evidence offered by the plaintiff to show that the defendant, a benefit society, declined to receive proof of the death of a member, because of his alleged suspension, is not to be regarded as proof of the suspension, but only as proof of the waiver of proof. Stewart *v.* Supreme Council American Legion of Honor, 36 Mo. App. 319, 329 (1889).

[1] Continental Co. *v.* Rogers, 119 Ill. 474, 487 (1887); Brink *v.* Guaranty Mutual Assoc., 7 N. Y. Suppl. 847 (1889).

[2] Thus, on the ground that the contract is avoided for non-payment of premium. Goodwin *v.* Mass. Mutual Co., 73 N. Y. 480, 490 (1878); (Knickerbocker) Co. *v.* Pendleton, 112 U. S. 696, 709 (1885). For instances of waiver by refusal to pay, on this and other grounds, see Miller *v.* Eagle Co., 2 E. D. Smith, 268, 285 (1854); Girard Co. *v.* Mutual Co., 97 Pa. St. 15, 25 (1881); Continental Co. *v.* Rogers, 119 Ill. 474 487 (1887); Covenant Mutual Assoc. *v.* Spies, 114 Ill. 463, 468 (1885); New Home Assoc. *v.* Hagler, 23 Ill. App. 457 (1887); Rippstein *v.* St. Louis Mutual Co. 57 Mo. 86 (1874); Kantrener *v.* Penn Mutual Co., 5 Mo. App. 581 (1878); Millard *v.* Legion of Honor, 81 Cal. 340, 349 (1889); Marston *v.* Massachusetts Co., 59 N. H. 92 (1879); Travelers' Co. *v.* Harvey, 82 Va. 949, 956 (1885); Dial *v.* Valley Mutual Assoc., 29 So. Car. 560, 579 (1888); Kansas Protective Union *v.* Whitt, 36 Kans. 760 (1887). The same rule is equally applicable to defects in *notice* of loss. Unthank *v.* Travelers' Co., 4 Bissell, 357 (1869). Sufficiency of proofs held (on appeal) waived, where the insurer at the trial admitted the loss and denied its liability on other grounds. Mulroy *v.* Supreme Lodge Knights of Honor, 28 Mo. App. 463, 467 (1888).

See, as to waiver under Georgia statute, Merritt *v.* Cotton States Co., 55 Ga. 103, 110 (1875); Piedmont & Arlington Co. *v.* Young, 59 Ga. 812, 817 (1877).

[3] Grattan *v.* Metropolitan Co., 80 N. Y. 281, 289 (1880); Payn *v.* Rochester Soc., 6 N. Y. State Reporter, 365 (1887); Covenant Mutual Assoc. *v.* Spies, 114 Ill. 463, 468 (1885); Dial *v.* Valley Mutual Assoc.,

be evidenced by *statements* as distinguished from conduct.[1] What has been previously said respecting the authority of agents of the insurer, will, generally speaking, be applicable here,[2] though, with reference to the limitations on their authority, a distinction has been made between their authority to waive the performance of stipulations to be

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29 So. Car. 560, 579 (1888). So, where an agent took away from an attending physician the blank that he was about to fill. There was, however, other proof of waiver. Travelers' Co. *v.* Harvey, 82 Va. 949, 958 (1885). So, where by the contract the proofs were to be made on blanks to be furnished by the insurer, held that proper proof might be made without such blanks, in case of the refusal of the insurer to furnish them. Gellatly *v.* Minnesota Odd Fellows' Soc., 27 Minn. 215 (1880). See Dean *v.* Ætna Co., 2 Hun, 358, 360; which was reversed on another point in 62 N. Y. 642 (1875).

[1] Where a statement of the insurer as to the sufficiency of the proofs of death, had been admitted in evidence as an admission against interest, held error, in charging the jury, to separate such statement from its accompanying language, that the proofs disclosed a case of suicide, and hold that the latter statement was an independent fact to be established by the insurer. This on the ground that the admission should have been taken as an entirety. (Mutual) Co. *v.* Newton, 22 Wall. 32 (1874). See (Mutual Benefit) Co. *v.* Higginbotham, 95 U. S. 380, 390 (1877).

[2] The authority of an agent to waive insufficiency of proof of death, was held sufficient in Goodwin *v.* Mass. Mutual Co., 73 N. Y. 480, 490 (1878), where he had authority to receive premiums, countersign and deliver renewals, and it was a part of his duty to report the death of the insured, and receive and deliver to those representing the deceased, the blanks necessary to make out proofs of loss. An agent held to be a general agent, with authority to waive insufficiency of proof of loss, where he was required to write the policy, and, by a notice appended to the policy, all policy-holders were required to give notice to him of any change of occupation, also notice of loss, with particulars and result. It also appeared that he had authority to settle the terms of insurance, investigate losses, and recommend the payment of losses. Travelers' Co. *v.* Harvey, 82 Va. 949, 956 (1885). See also, as to evidence of authority to waive insufficiency of proofs, Jennings *v.* Metropolitan Co., 148 Mass. 61 (1888); Travelers' Co. *v.* Edwards, 122 U. S. 457 (1887); Cotton States Co. *v.* Edwards, 74 Ga. 220, 228 (1884).

performed *after* a loss has occurred, such as giving notice and furnishing proofs, and their authority to waive other conditions.[1]

§ 119. **Proofs as evidence.**—The proofs furnished to the insurer, being in the nature of declarations made by the insured with reference to the subject of the action, the admissibility of such proofs in evidence is, generally speaking, governed by the general rules of evidence affecting the admissibility of declarations of a party to an action. Although the proofs are admissible in favor of the claimant, for the purpose of showing that they were duly furnished as required by the contract,[2] yet, being declarations made by him, they are, on general principles, inadmissible in his favor, even as *prima facie* evidence of the

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[1] Thus, a provision denying the right of the insured to claim "a waiver by reason of any acts of any agent, unless such waiver is specially authorized in writing over the signature of the president or secretary of the company," was held confined to provisions and conditions of the contract that enter into and form a part of the contract, and are essential to make it a binding contract, and not to extend to stipulations to be performed after a loss has occurred, such as giving notice and furnishing proofs of death. Travelers' Co. *v.* Harvey, 82 Va. 949, 955 (1885). So of a provision that agents were not authorized to make, alter or discharge contracts or waive forfeitures. Jennings *v.* Metropolitan Co., 148 Mass. 61 (1888).

[2] People's Mutual Accident Assoc. *v.* Smith, 126 Pa. St. 317 (1889); Travelers' Co. *v.* Sheppard, 12 Southeastern Rep. 18, 21 (Supm. Ct. Ga. 1890); Mutual Co. *v.* Stibbe, 46 Md. 302, 312 (1876). See Mutual Co. *v.* Lawrence, note 1, p. 219.

An admission that proofs have been furnished, does not preclude the introduction of the documentary evidence. John Hancock Mutual Co. *v.* Moore, 34 Mich. 41, 43 (1876). The proofs being commonly in the possession of the insurer, it is sometimes necessary for the claimant to call on the insurer to produce them. In Continental Co. *v.* Rogers, 119 Ill. 474, 489 (1887), the filing of the declaration in the action was held an implied notice sufficient for the purpose, so that, on failure to produce them, verbal testimony as to their contents was admissible.

facts stated therein.[1] But again, on general principles, they are, as declarations made by him, admissible as evidence against him and in favor of the insurer.[2] Thus, when they have been introduced in evidence by the claimant, for the purpose of showing that the proofs were given, they are then competent evidence in favor of the insurer.[3] And, if the claimant has put in evidence only a

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[1] People's Mutual Accident Assoc. *v.* Smith, 126 Pa. St. 317 (1889); Travelers' Co. *v.* Sheppard, 12 Southeastern Rep. 18, 21 (Supm. Ct. Ga. 1890); Mutual Co. *v.* Stibbe, 46 Md. 302, 312 (1876); U. S. Co. *v.* Kielgast, 26 Ill. App. 567, 572 (1887); Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 644 (1885). Thus, held error to allow affidavits constituting a portion of the proofs of loss, to be read in full to the jury on behalf of the claimant, there being no contention on the part of the insurer that the proofs had not been furnished as agreed. Cook *v.* Standard Co., 47 Northwestern Rep. 568 (Supm. Ct. Mich. 1890). But the rule seems to be that, if the proofs have been admitted in evidence generally, *without limitation* to the specific purpose of showing that the condition for furnishing proof has been complied with, they are evidence of the facts stated therein, in favor of the claimant. Lawrence *v.* Mutual Co., 5 Bradw. (Ill.), 280, 283 (1879). See Covenant Mutual Benefit Assoc. *v.* Hoffman, 110 Ill. 603, 608 (1884).

[2] But where it appeared that the insurer was not prejudiced by the exclusion of a portion of such proof, held not ground for reversal. Clapp *v.* Mutual Benefit Co., 99 Mass. 317, 325 (1868). A mere *ex parte* certificate of death, though made by the attending physician of the insured, is not even *prima facie* evidence in favor of the insurer. Davey *v.* Ætna Co., 38 Fed. Rep. 650 (1889), where, however, being explained and affirmed at the trial, by the physician who made it, it was held proper to consider it as part of the evidence. In Dreier *v.* Continental Co., 24 Fed. Rep. 670 (1885), held that statements by physicians that are by statute made confidential, do not become available as evidence in favor of the insured, because found in or connected with the proofs; especially when the statements in question are not concerning the last sickness or proximate cause of death.

[3] Thus, where the claimant had put in evidence the record of the proceedings before the coroner, solely for the purpose of showing a compliance with the requirement for furnishing proofs, held that, being on evidence, it was evidence as to the manner of death, and, it containing evidence showing that he had committed suicide, held error

portion of such proofs, the insurer may, on general principles, insist that the proofs be put in evidence as an entirety.[1] Being in evidence, they are at least *prima facie* evidence of the facts.[2] And it has been held that they are conclusive evidence of such facts, as against the claimant, unless before the trial he has furnished the insurer a corrected statement.[3] But the tendency of more recent decisions has been to relax the strictness of this rule,[4] and the better opinion would seem to be, that the rule applies only where the insurer has been prejudiced in his defense, by relying on the statements contained in the proofs.[5] But, whatever may be the rule as to what

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to find that there was no evidence sufficient to show that he had committed suicide. Walther *v.* Mutual Co., 65 Cal. 417 (1884).

[1] But this held not to apply to a mere endorsement on the back of the proof, acknowledging the receipt of such proof; such endorsement being in effect a distinct paper from the proof itself. Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 643 (1885). The insurer having been called upon to produce the proofs, and having produced a quantity of papers including such proofs, held that the plaintiff was not bound to offer all the papers in evidence, at least not such as he had not furnished himself. Heaffer *v.* New Era Co., 101 Pa. St. 178 (1882).

[2] (Mutual) Co. *v.* Newton, 22 Wall. 32 (1874; holding it error to exclude such evidence); Phillips *v.* N. Y. Co., 9 N. Y. Suppl. 836 (1890). But the effect of such evidence must not be unduly extended. Thus, where a certificate of death furnished by the claimant contained a statement of the disease of which the insured died, held proper to refuse to charge that such statement might be considered as tending to support the theory that he was afflicted with that disease at the time of the application for insurance. Continental Co. *v.* Yung, 113 Ind. 159, 162 (1887). See Covenant Mutual Benefit Assoc. *v.* Hoffman, 110 Ill. 603, 609 (1884).

[3] See (Mutual) Co. *v.* Newton, above, and cases cited; also Phillips *v.* N. Y. Co., 9 N. Y. Suppl. 836 (1890).

[4] See Bentz *v.* Northwestern Aid Assoc., 40 Minn. 202, 206 (1889); Mutual Co. *v.* Stibbe, 46 Md. 302, 313 (1876; so of a mere declaration made by the claimant of her opinion and belief of the cause of death).

[5] (Mutual) Co. *v.* Newton, above. In Neill *v.* American Popular Co.,

are strictly proofs, a statement contained in or accompanying the proofs, as to a matter on which no proofs were required by the contract, may, even if admissible, be contradicted by the claimant at the trial, without previous notice.[1] And, furthermore, the rule by which the claimant is bound by his own statements, does not apply to statements made by a third person, as in a document furnished by the claimant as part of the proofs, in accordance with the requirements of the contract;[2] *a fortiori*, if the documents so furnished were not required by the contract.

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42 N. Y. Super. Ct. 260 (1877); Cotton States Co. *v.* Edwards, 74 Ga. 220, 230 (1884), the claimant was allowed to show that the facts were different from those stated in the proofs; *i. e.*, to show a discrepancy of a year in stating the age of the insured. So in Keels *v.* Mutual Reserve Fund Assoc., 29 Fed. Rep. 198 (1886), the claimant was held not bound by the statement in the proofs that the insured committed suicide, and a recovery was sustained on evidence admitted on the trial showing that his death was accidental. S. P., Sargent *v.* Home Benefit Assoc., 35 Fed. Rep. 711 (1888; dictum).

[1] Conn. Mutual Co. *v.* Schwenk, 94 U. S. 593 (1876). Thus, the claimant having, in addition to the proofs that he was required by the contract to furnish, furnished at the request of the insurer a copy of proceedings before a coroner, held that such proceedings were improperly admitted in evidence against the claimant, so as to throw upon him the burden of proof as to the cause of death. Goldschmidt *v.* Mutual Co., 102 N. Y. 486 (1886). So, held not error in such case to refuse to admit the same against the objection of the *claimant*, as evidence of the truth of the statements contained therein. U. S. Co. *v.* Kielgast, 26 Ill. App. 567 (1887). This on the ground that the delivery of such paper was merely an admission that a coroner's inquest had been held, and that the paper delivered was a copy of the verdict and evidence, as the same appeared in the record of such inquest. But where the contract provided that in case of an inquest the insurer should be furnished with a copy of the verdict and of the evidence taken upon the inquest, as a part of the proofs of loss, it was held not error to admit the same in evidence, against the objection of the *insurer*. Mutual Co. *v.* Laurence, 8 Bradw. (Ill.), 488 (1881).

[2] That is to say, such statements, even when admissible against him, are not conclusive upon him, and the jury should be charged to that effect. See Davey *v.* Ætna Co., 20 Fed. Rep. 482, 485 (1884). Thus,

§ 120. Limitation of period within which liability of insurer may be enforced.—Although the length of the period within which proceedings must be instituted to enforce the liability of the insurer is, in the absence of any provision in the contract to the contrary, determined by the general law of limitations,[1] yet the effect of such general

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a recovery was sustained against the objection that the statement that the insured was required to procure from the attending physician, disclosed a state of facts precluding a recovery. Cushman *v.* U. S. Co., 70 N. Y. 72, 79 (1877); so of an affidavit by such physician, furnished as part of the proofs. Conn. Mutual Co. *v.* Siegel, 9 Bush (Ky.), 450 (1872). So where the affidavits of several attending physicians were furnished, there being a discrepancy among them as to the cause of death. Bentz *v.* Northwestern Aid Assoc., 40 Minn. 202 (1889). So, where the claimant had, as part of the proofs, put in evidence an affidavit of another person against his own objection, and on the requirement of the insurer that the proofs be put in as an entirety, such affidavits not being, however, a necessary part of the proofs, it was held not error for the trial court to hold that the claimant was not absolutely concluded by the statements therein. Day *v.* Mutual Benefit Co., 1 MacArthur (D. C.), 598 (1874); affirmed in (Mutual Benefit) Co. *v.* Higginbotham, 95 U. S. 380 (1877). And in Buffalo Loan, &c., Co. *v.* Knights Templar Assoc., 56 Hun, 303 (1890), where the certificate furnished by the physician as part of the proofs of loss, stated as the cause of death what, if true, would have avoided the contract, the contract, however, not calling for a statement of the cause of death, such statement was held properly excluded.

On the same general principle, held proper to charge that anything that appeared in the proofs of loss to have been received by the parties as *hearsay* evidence, should not be considered. Mutual Co. *v.* Schmidt, 6 Am. L. Rec. (Cin. Ohio), 629 (1880). But where in accordance with the request of the insurer certain persons were named, to whom the insurer might apply "for information to enable them to judge of the identity of the person, the justness of the claim, &c.," held not error to charge that the claimant was bound by statements made by such persons *with regard to the proof of loss*, but not by their other statements. American Co. *v.* Day, 39 N. J. Law, 89, 97 (1876).

[1] With respect to a statute of limitations, the cause of action on a contract of insurance held to accrue on the lapse of a reasonable time after the loss for preparing and presenting proof, not when the demand for payment was actually made. Spratley *v.* Mutual Benefit Co., 11 Bush

law may be controlled by agreement of the parties, as, for instance, if by the contract a shorter period is prescribed than that prescribed in the general law.[1] But such provisions for limitation, being in derogation of a right, are strictly construed.[2] Thus, if a cause intervenes which prevents the claimant from instituting proceedings before the specified contract period expires, the contract bar cannot

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(Ky.), 443 (1875), which also see as to the effect of war in suspending the right of action. The statute of limitations of the place where the contract was to be performed, held the one applicable. Id. A company held entitled to rely on the statute of limitations of the State where it had a local existence and domicil for the purpose of being sued. Conn. Mutual Co. *v.* Duerson, 28 Gratt. (Va.), 630, 643 (1877). See Abell *v.* Penn Mutual Co., 18 W. Va. 401, 417 (1881).

[1] Suggs *v.* Travelers' Co., 71 Tex. 579 (1888; holding such provision binding on a minor beneficiary, notwithstanding exceptions in the statutes favoring such beneficiaries). S. P., O'Laughlin *v.* Union Central Co., 11 Fed. Rep. 280 (1882). See Mutual Accident Assoc. *v.* Kayser, 14 W. N. C. 86 (1883).

A provision that agents of the insurer were not authorized to make, alter or discharge contracts, or waive forfeiture, held not to apply to waiver of such a provision. Jennings *v.* Metropolitan Co., 148 Mass. 61 (1888). But even a provision that delay for a certain time to enforce the contract should be *conclusive evidence* against any claim thereon, held waived by the subsequent action of the parties. Metropolitan Co. *v.* Dempsey, 19 Atlantic Rep. 642 (Ct. of App. of Md. 1890). The rule that part payment will take a case out of the statute of limitations as to the balance, applied to a limitation in a contract of insurance. Kentucky Mutual Security Fund Co. *v.* Turner, 13 Southwestern Rep. 104 (Ct. of App. of Ky. 1890). As to effect of provision that no action shall be brought on the contract until the expiration of a certain time from the time of proofs of loss, unless in the event of a peremptory refusal of the insurer to pay, see Citizens' Co. *v.* Boisvert, 11 Quebec L. R. 377 (1885).

[2] Thus, where by the contract the limitation is expressed as running from the *time* or *happening* of the loss, yet this has been construed to mean that such limitation does not commence to run until the cause of action for such loss is *matured*. Matt *v.* Iowa Mutual Aid Assoc., 46 Northwestern Rep. 857 (Supm. Ct. Iowa, 1890); as, for instance, when the proofs of loss have been accepted. Cooper *v.* U. S. Mutual Accident Assoc., 57 Hun, 407 (1890).

be afterward *revived*, but is absolutely removed, and the claimant is then bound only by the limitation prescribed by the general law.[1]

§ **121. Who may enforce such liability.**—The determination of who may enforce the liability of the insurer, or, as the question usually arises, who has the right to collect the insurance money, depends of course in each case on the terms of the particular contract. Ordinarily, the person named therein as the payee of such money is the person who has such right,[2] and this is so, though it may appear

[1] Earnshaw *v.* Sun Mutual Co., 68 Md. 465 (1888; where the intervening cause was an injunction against bringing the action).

[2] Thus, the *personal representative* of the insured held to have no right of action on a contract to pay the *devisee* of the insured. Worley *v.* Northwestern Masonic Aid Assoc., 16 Western Jurist, 85 (1881). So of a contract to pay the wife of the insured. McNeil *v.* Golden Cross, 131 Pa. St. 339 (1890).

As to party *in interest* entitled under statute to sue, see Lee *v.* Fraternal Mutual Co., 1 Handy (Ohio), 217, 232 (1854). See as to *legal title* under Georgia statute, Alabama Gold Co. *v.* Garmany, 74 Ga. 51, 55 (1884).

The doctrine of insurable interest does not prevent the designation of a person without such interest, merely for the purpose of receiving the amount due on the contract. Franklin Co. *v.* Sefton, 53 Ind. 380, 382 (1876). Nor does it seem to prevent the right to transfer a mere right of action against the insured, *i. e.*, to transfer the interest in the contract *after* the loss insured against has occurred. Id.

Ordinarily, at least, the interests of several beneficiaries in the same contract of insurance are several, so that they cannot join in an action to enforce the contract. Keary *v.* Mutual Reserve Fund Assoc., 30 Fed. Rep. 359 (1887); Fraser *v.* Phœnix Mutual Co., 36 U. C. Q. B. D. 422 (1875). See Campbell *v.* National Co., 34 Id. 35 (1873). Under an agreement to pay to several persons a certain sum, "share and share alike," held that each of such persons could sue separately for his share. Emmeluth *v.* Home Benefit Assoc., 122 N. Y. 130 (1890). As to necessity at common law that all of joint promisees in contract sue thereon, and as to effect of death of one of such promisees, see Continental Co. *v.* Webb, 54 Ala. 688, 695 (1875); Piedmont & Arlington Co. *v.* Young, 58 Ala. 476, 488 (1877).

that such payment is intended to be ultimately for the benefit of another.[1] And, in accordance with what is the

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As to how far the insurer is protected in making payment in good faith to a wrongful claimant, see Supplee *v.* Knights of Birmingham, 18 W. N. C. (Pa.), 280 (1885). The insurer held protected by payment to an assignee having *prima facie* title, the assignment being regular and formal, and there being no notice of an adverse claim. Home Mutual Assoc. *v.* Seager, 128 Pa. St. 533 (1889). To similar effect, Northwestern Mutual Co. *v.* Roth, 118 Pa. St. 329 (1888). See note, p. 116. As to enjoining action at law to enforce contract, on ground of doubt as to plaintiff's title as assignee, see Scottish Amicable Soc. *v.* Fuller, 2 Irish Rep. (Equity), 53 (1867). As to Ontario statute, protecting insurer in payment made in good faith, see Oates *v.* Supreme Order of Foresters, 4 Ontario Rep. 535, 551 (1884).

[1] Gould *v.* Emerson, 99 Mass. 154 (1868); Unity Mutual Assoc. *v.* Dugan, 118 Mass. 219 (1875); Davenport *v.* Mutual Assoc., 47 Vt. 528 (1875); Piedmont & Arlington Co. *v.* Ray, 50 Tex. 511, 521 (1878). Thus, where the contract was to pay the executors, administrators or assigns of the insured "for the benefit of his widow," held that the widow could not maintain an action on the contract. Bailey *v.* New England Mutual Co., 114 Mass. 177 (1873). So recovery was allowed by the payees named, notwithstanding an allegation in their pleadings that the action was brought for the benefit of others. Rindge *v.* New England Mutual Aid Soc., 146 Mass. 286 (1888). So of a contract to pay the insured, "his executors, administrators or assigns, for the sole use and benefit of" his children. Stowe *v.* Phinney, 78 Me. 244 (1886). See Pingrey *v.* National Co., 144 Mass. 374, 381 (1887). The objection that the plaintiff was not the proper party to sue, being merely one for whose benefit the contract was made, held waived by going to trial on the merits. Campbell *v.* New England Mutual Co., 98 Mass. 381, 400 (1867). Hardly to be reconciled with the above authorities is McComas *v.* Covenant Mutual Co., 56 Mo. 573 (1874), where a statute allowing *a trustee of an express trust* to sue in his own name without joining the person for whose benefit the suit is brought, was held not to preclude the beneficiary under the contract from suing without joining the trustee. But see, as to who may sue as "trustee of an express trust," Greenfield *v.* Mass. Mutual Co., 47 N. Y. 430 (1872); Wright *v.* Mutual Benefit Co., 118 N. Y. 237, 244 (1890). Thus, in case of provision for payment to guardian, Price *v.* Phœnix Mutual Co., 17 Minn. 497, 499 (1871). See also, as to payment to trustee, Curtin *v.* Jellicoe, 13 Irish Chancery Rep. 180 (1862). As to effect of statute allowing a person with whom a

prevailing doctrine, the right of such payee is not impaired by the circumstance that he is not a party to the contract.[1] But by a technical rule of the common law, this is held not to apply to a contract under seal, in which case it can be enforced only by a party thereto.[2]

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contract is made for the benefit of another, to sue without joining the beneficiary, see N. Y. Co. *v.* Bonner, 11 Nebr. 169 (1881).

Sometimes the right of recovery by the personal representative of the insured, is governed by the law of place in reference to the actual location of the policy or other instrument evidencing the contract. See Holyoke *v.* Union Mutual Co., 22 Hun, 75 (1880); affirmed in 84 N. Y. 648 (1881); Morrisson *v.* Mutual Co., 57 Hun, 97 (1890); New England Mutual Co. *v.* Woodworth, 111 U. S. 138 (1884). Recovery by the executors of the insured held to bar a subsequent recovery by the beneficiaries, the beneficiaries, by obtaining a decree against the executors for such amount, having ratified the act of the executors in collecting. Equitable Soc. *v.* May, 82 Ga. 646 (1889). As to effect of agreement to pay guardian, see Wuesthoff *v.* Germania Co., 107 N. Y. 580, 587 (1888).

[1] Pierce *v.* Charter Oak Co., 138 Mass. 151, 161 (1884); Martin *v.* Ætna Co., 73 Me. 25 (1881); Abe Lincoln Soc. *v.* Miller, 23 Ill. App. 340, 344 (1887). To the contrary, Fugure *v.* Mutual Soc. of St. Joseph, 46 Vt. 362 (1874); Tripp *v.* Vermont Co., 55 Vt. 100, 106 (1882). Compare, however, Fairchild *v.* Northeastern Mutual Assoc., 51 Vt. 613, 623 (1879). See Myers *v.* Keystone Mutual Co., 27 Pa. St. 268 (1856); Collett *v.* Morrison, 9 Hare, 162, 176 (1851). See, under Virginia statute, Clemmitt *v.* N. Y. Co., 76 Va. 355, 360 (1882).

[2] Flynn *v.* North American Co., 115 Mass. 449 (1874; where the contract being with the insured, his heirs, executors, administrators and assigns, to pay a third person, held that such person, not being a party to the contract, could not maintain an action thereon); Flynn *v.* Mass. Benefit Assoc., 25 Northeastern Rep. 716 (Supm. Ct. Mass. 1890); Fairchild *v.* Northeastern Mutual Assoc., 51 Vt. 613, 623 (1879). But see York County Assoc. *v.* Myers, 11 W. N. C. (Pa.), 541 (1882). In Mutual Co. *v.* Stibbe, 46 Md. 302, 311 (1876), though this rule was conceded to apply to a contract *inter partes*, that is, between persons described on the face of it as parties, it was declared not to apply to a *deed poll*, as a contract executed under seal by the *insurer alone*, though containing a promise to pay a person specified. In such case the person specified can maintain an action on the contract. In that case, however, it appeared that the plaintiff signed the *application* for the policy.

§ 122. **Form of proceeding to enforce such liability.**— Where the agreement of the insurer is simply to pay a certain sum on the happening of a certain event, the form of proceeding to enforce the liability is, in all ordinary cases at least, an action at law based on such contract to pay,[1] and in jurisdictions where the common law forms of pleading still prevail, regard must be had to the distinction between *assumpsit*, as the proper form of action on a simple contract, and debt, or covenant, as the proper form of action on a contract under seal.[2] The questions that have caused the most difficulty in this connection have arisen out of

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[1] In Britton *v.* Royal Arcanum, 46 N. J. Eq. 102, 112 (1889), the jurisdiction of equity to compel payment of the amount of insurance, was sustained on the ground that by the agreement the insurer was not obliged to pay until the surrender of the certificate, and that such certificate was in the possession of a third person who refused to give it up. In Continental Co. *v.* Webb, 54 Ala. 688 (1875), a suit in equity to ascertain the beneficiaries and their quantum of interest, and to compel the insurer to pay the amount due into court, for the purpose of distribution, was held not maintainable merely on proof that the policy was in the possession of other persons claiming to be beneficiaries, who had refused to exhibit it to the complainant, it not being averred that there was any dispute or controversy as to the terms or conditions of the policy, or that any application had been made to the insurer for information of its terms and conditions.

A bill of interpleader by the insurer dismissed on the ground that it was a question whether, by reason of the insurer's own acts, it was not liable to each of the claimants. National Co. *v.* Pingrey, 141 Mass. 411 (1886).

An agreement whereby the insured was limited to a particular jurisdiction for the purpose of enforcing the contract, held invalid. Reichard *v.* Manhattan Co., 31 Mo. 518 (1862). So where the limitation was to a single county. Matt *v.* Iowa Mutual Aid Assoc., 46 Northwestern Rep. 857 (Supm. Ct. Iowa, 1890).

[2] Pennsylvania Mutual Aid Soc. *v.* Corley, 2 Pennypacker (Pa.), 398 (1882). But the technical error of suing in *assumpsit*, instead of covenant, on a policy under seal, held amendable. American Co. *v.* Day, 39 N. J. Law, 89 (1876). See also, as to right of action on contract under seal, Peet *v.* Great Camp Knights of Maccabees of World, 47 Northwestern Rep. 119 (Supm. Ct. Mich. 1890).

that class of mutual benefit insurance contracts that contain an agreement to make an assessment[1] on the members of the insuring body generally (or the members of a certain class thereof), and pay the sum resulting from such assessment, not exceeding a sum specified. The mode of enforcing the liability of the insurer in such case has been the subject of much discussion, resulting in considerable difference of opinion, which, however, viewed with reference to the facts of particular cases, is undoubtedly more apparent than real, as a difficulty here has been a tendency to lay down general rules, with too little regard to the facts of particular cases.[2] As, in such case, the making of the assessment depends on the action of the insurer, the refusal of the insurer to make such assessment would make the ordinary form of action at law an inadequate remedy, and it seems generally agreed that, under the principles regulating the employment of the remedy of *mandamus*, *mandamus* is not the proper remedy.[3] Hence, the legal

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[1] It is the duty of the company to resist payment of an invalid claim, though by an assessment on other members it may have realized the money to pay such claim. Mayer *v.* Equitable Assoc., 42 Hun, 237 (1886).

Where a member had disappeared, and there was no regular proof of his death, but a resolution was passed directing an assessment to pay the amount due, held that the assessment should be on those who were members at the date of the resolution, not such as were so at the time of the disappearance. Miller *v.* Georgia Masonic Mutual Co., 57 Ga. 221 (1876).

An application by the assignee in bankruptcy of a benefit society, for an assessment upon the members, was, in view of the provisions of the contract authorizing such assessment, refused. *Re* Protection Co., 9 Bissell, 188 (1879).

[2] See cases cited at end of note 1, p. 234.

[3] Excelsior Mutual Aid Assoc. *v.* Riddle, 91 Ind. 84 (1883); Burland *v.* Northwestern Mutual Aid Assoc., 47 Mich. 424 (1882). So in Smith *v.* Society, 12 Phila. (Pa.), 380 (1878), disapproving Toram *v.* Howard Beneficial Assoc., 4 Pa. St. 519 (1846); Black & Whitesmiths' Soc. *v.* Vandyke, 2 Wharton (Pa.), 309 (1837). But to the contrary is Rains-

remedy being inadequate, the proper remedy would seem to be a proceeding in equity to compel specific performance of the agreement to make the assessment and pay over the sum resulting from such assessment.[1] But this

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barger *v.* Union Mutual Aid Assoc., 72 Iowa, 191 (1887), holding *mandamus* to be the proper remedy. And *mandamus* held a proper remedy after judgment. People *v.* Masonic Guild, 12 N. Y. Suppl. 171 (1890).

[1] Specific performance was so decreed in Covenant Mutual Benefit Assoc. *v.* Sears, 114 Ill. 108 (1885). And that a suit for specific performance will lie in such case, has been admitted even where it has been held that an action at law would lie. Northwestern Benev. Assoc. *v.* Wanner, 24 Ill. App. 357 (1887); O'Brien *v.* Home Benefit Soc., 117 N. Y. 310 (1889); and see Burdon *v.* Mass. Safety Fund Assoc., 147 Mass. 360, 367 (1888). In Taylor *v.* National Temperance Union, 94 Mo. 35, 42 (1887), the opinion is expressed that a suit in equity is an appropriate remedy in case of the insolvency of the insurer. And sometimes the express provisions of the contract are such as to clearly make a suit for specific performance the *only* remedy. Thus, where it was provided, "the only action maintainable thereon on this policy shall be to compel the association to levy the assessments herein agreed upon, and if a levy is ordered by the court, the association shall be liable under this policy only for the sum collected under an assessment so made." Eggleston *v.* Centennial Mutual Assoc., 18 Fed. Rep. 14 (1883); 19 Id. 201 (1883). Under a provision that the insured was "entitled to participate in the mortuary or relief fund of the association, not to exceed the amount of $5,000, which sum, or such a part thereof as may be collected for that purpose by the payment of one regular assessment of $2 for each member of the association liable at the date of the accident, shall be paid" (to a beneficiary specified), a decree in equity that an assessment should be made, and that in the event of a deficiency the insurer should pay the difference between the amount collected and $5,000, was affirmed. This on the ground that it appeared that there would have been no deficiency, had the assessment been made in accordance with the contract. Union Mutual Assoc. *v.* Frohard, 25 Northeastern Rep. 642 (Supm. Ct. Ill. 1890). But where the insurer, being a foreign corporation, refused to obey an order to make an assessment to pay a loss, held that, since proceedings in contempt against the non-resident officers would have been futile, a judgment against the corporation for the amount of the policy, with interest from the time it should have been paid, had an assessment been made in the regular course of business,

view has not met with general acceptance, and, in accordance with an interpretation of such agreements, hereafter to be considered, an action at law has been held to be not only a proper, but an adequate remedy.[1]

§ 123. Pleading and evidence in action at law to enforce liability of insurer.—In the large majority of cases, the proceeding to enforce the liability of the insurer is by an action at law. The sufficiency of the declaration (or complaint, or whatever be the term used to designate the plaintiff's pleading), must, in the absence of statute, be tested by the rules of the common law.[2] For present pur-

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was the proper relief. Newman *v.* Covenant Mutual Assoc., 76 Iowa, 56 (1888).

In Van Houten *v.* Pine, 36 N. J. Eq. 133 (1882), a bill in equity to compel payment of the insurance by an *unincorporated benefit society* was sustained on demurrer, against the objection of want of equity; but, it appearing that the funds on hand were sufficient to pay the amount in question, it was left undecided whether the court has jurisdiction in a proper case to order an assessment. And here it was held unnecessary to join the members of the association as parties to such suit.

[1] O'Brien *v.* Home Benefit Soc., 117 N. Y. 310, 318 (1889); Freeman *v.* National Benefit Soc., 42 Hun, 252 (1886); Peck *v.* Equitable Accident Assoc., 52 Hun, 255 (1889); Reynolds *v.* Equitable Accident Assoc., 17 N. Y. State Reporter, 337 (1888); Doty *v.* N. Y. State Mutual Benefit Assoc., 9 N. Y. Suppl. 42, 44 (1890); Excelsior Mutual Aid Assoc. *v.* Riddle, 91 Ind. 84 (1883); Suppiger *v.* Covenant Mutual Benefit Assoc., 20 Bradw. (Ill.), 595, 599 (1886); Abe Lincoln Soc. *v.* Miller, 23 Ill. App. 341, 345 (1887); Northwestern Benev. Assoc. *v.* Wanner, 24 Ill. App. 357, 363 (1887); Jackson *v.* Northwestern Mutual Assoc., 73 Wis. 507, 511 (1889); Bentz *v.* Northwestern Aid Assoc., 40 Minn. 202 (1889); Taylor *v.* National Temperance Union, 94 Mo. 35, 41 (1887); Earnshaw *v.* Sun Mutual Soc., 68 Md. 465, 471 (1888). See also, Supreme Lodge Knights of Honor *v.* Abbott, 82 Ind. 1 (1882).

[2] Thus, it is laid down in Brooklyn Co. *v.* Bledsoe, 52 Ala. 538, 546 (1875): "Independent of statutory provisions, the rules of pleading are the same in their application to contracts of insurance as to other contracts. The contract, or policy, of insurance must be declared on *in hæc verba*, or according to its legal effect; the plaintiff's interest in the subject of insurance; the payment of the premium; the inception of the

poses, we assume the contract sought to be enforced to be (as ordinarily it is) a mere contract to pay on the happening of a certain event. When (as is usually the case) the insurer is a corporation, the incorporation of the insurer should be alleged.[1] Then the contract sought to be enforced should be set out according to its legal effect,[2] it

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risk; the performance of any precedent condition, or warranty, contained in the policy, and the loss, or happening of the event on which, within the terms and meaning of the policy, the liability of the insurer attaches, must be alleged." And in Britt *v.* Mutual Benefit Co., 10 Southeastern Rep. 896 (Supm. Ct. N. C. 1890), a complaint was sustained on demurrer, that alleged the incorporation (of the insurer); the issuing of the policy; the death of the insured, and the qualification of the plaintiff as administratrix; the payment of all premiums by the insured; the notice and proofs of death given to the insurer, and demand for payment of the amount due; also that the insured and the plaintiff had "duly fulfilled all of the conditions and stipulations required of them" by the contract. In Kaw Life Assoc. *v.* Lemke, 40 Kans. 142, 145 (1888), a petition in an action on a contract of benefit insurance, was held to state a good cause of action, where it alleged "the issuing of the policy; the death of insured; the doing of all things necessary to preserve the policy during the lifetime of insured; the proof of death, and the demand upon the company for the amount of the policy; the failure of the company to make the assessments within 90 days after the proof of death; the failure of the association to comply with the terms and conditions stated in the policy," with prayer for judgment. See also, as to sufficiency of plaintiff's pleading, Pierce *v.* Charter Oak Co., 138 Mass. 151, 161 (1884); Price *v.* Phœnix Mutual Co., 17 Minn. 497, 500 (1871); Pennsylvania Mutual Aid Soc. *v.* Corley, 2 Pennypacker (Pa.), 398 (1882); Heffernan *v.* Supreme Council American Legion of Honor, 40 Mo. App. 605 (1890). And see form in Appendix.

An action on a contract of reinsurance, held improperly joined with one on the original contract. Lee *v.* Fraternal Mutual Co., 1 Handy (Ohio), 217, 232 (1854). See also, as to objection that complaint fails to state a single cause of action, Costikyan *v.* Travelers' Co., 12 N. Y. Suppl. 413 (1891).

[1] See Britt *v.* Mutual Benefit Co., above.

[2] "If a written contract has been varied in its terms by the parties, the new or varied contract is the one upon which suit is to be brought." Tripp *v.* Vermont Co., 55 Vt. 100, 107 (1882).

being common, though not necessary, to make the contract *in hæc verba* a part of the pleading, by reference or otherwise.[1] As we have seen, the insurable interest of the plaintiff in the life insured, and the nature of such interest, must also be alleged;[2] also the performance of any conditions precedent created by the contract.[3] But, on general principles, it is unnecessary to allege the performance of conditions subsequent,[4] or to negative what are mere exceptions from the liability assumed by the insurer.[5] Of

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As to pleading and proving consideration, see Mutual Benefit Co. *v.* Cannon, 48 Ind. 264, 268 (1874); Phœnix Co. *v.* Raddin, 120 U. S. 183, 196 (1887).

[1] Under the Indiana statute, a complaint founded on a policy was held insufficient on demurrer, for failing to make the policy, or a copy thereof, a part of the pleading, or to show a sufficient excuse for not doing so. McLean *v.* Equitable Soc., 100 Ind. 127, 134 (1885). But by statute in Massachusetts, it is unnecessary to set out the policy as part of the pleading. See Pierce *v.* Charter Oak Co., 138 Mass. 151, 159 (1884). A recovery on the contract was set aside for failure to introduce a benefit certificate in evidence, where it had been made part of the plaintiff's pleading and there was a general denial. Knights of Honor *v.* Fortson, 14 Southwestern Rep. 922 (Supm. Ct. Tex. 1890).

[2] See § 58.

[3] Where the plaintiff alleged an unconditional contract to pay, while the evidence established only a contract to pay on the performance of certain conditions precedent, held a mere variance, not fatal to recovery. Heffernan *v.* Supreme Council American Legion of Honor, 40 Mo. App. 605 (1890). Sometimes, however, it is expressly provided by statute that such a general allegation shall be sufficient. Under such a statute, a specific allegation of payment of premiums was held unnecessary. Brooklyn Co. *v.* Bledsoe, 52 Ala. 538, 547 (1847). So of an allegation that notice of loss had been given. Scheiderer *v.* Travelers' Co., 58 Wis. 13, 18 (1883). And under such a general allegation, proof was held admissible of an *excuse* for non-performance of a particular condition. Brooklyn Co. *v.* Bledsoe, above. To the contrary, it seems, Tripp *v.* Vermont Co., note 5, below.

[4] Dennis *v.* Union Mutual Co., 84 Cal. 570 (1890).

[5] Coburn *v.* Travelers' Co., 145 Mass. 226, 229 (1887); Tripp *v.* Vermont Co., 55 Vt. 100, 107 (1882). Thus, under a provision that self-destruction was not a risk assumed, held not necessary for the plaintiff

course, what are conditions precedent must largely depend on the terms of each particular contract,[1] and, it may be added, many of the established principles of the law of life insurance are in direct contrariety to the rule requiring allegation and proof of the performance of conditions prece-

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to plead or prove that the insured had *not* committed self-destruction. Dennis *v.* Union Mutual Co., 84 Cal. 570 (1890).

[1] See as to notice and proofs of loss, § 113. In contracts of benefit insurance, it is frequently made a condition precedent, that the insured be a member of the insuring society in good standing at the time of the loss. In such case, the burden is on the plaintiff to show that he was in such good standing. Siebert *v.* Supreme Council Chosen Friends, 23 Mo. App. 268, 275 (1886). Yet, if the certificate of membership, reciting that he is in good standing, is put in evidence, the burden is on the insurer to show that he had lost such good standing. Supreme Lodge Knights of Honor *v.* Johnson, 78 Ind. 110 (1881); Mulroy *v.* Supreme Lodge Knights of Honor, 28 Mo. App. 463, 467 (1888); Stewart *v.* Supreme Council American Legion of Honor, 36 Mo. App. 319, 329 (1889). See also, as to evidence of good standing, Cramer *v.* Masonic Assoc. of Western N. Y., 9 N. Y. Suppl. 356 (1890); McMurry *v.* Supreme Lodge Knights of Honor, 20 Fed. Rep. 107 (1884); Smith *v.* Knights of Father Matthew, 36 Mo. App. 184, 192 (1889); Mills *v.* Rebstock, 29 Minn. 380 (1882); Baldwin *v.* Golden Star Fraternity, 47 N. J. Law, 111 (1885); Oates *v.* Supreme Court of Foresters, 4 Ontario Rep. 535 (1884). As to being "in arrears," see Wiggin *v.* Knights of Pythias, 31 Fed. Rep. 122 (1887); Sherry *v.* Operative Plasterers' Union, 20 Atlantic Rep. 1062 (Supm. Ct. Pa. 1891).

A provision that "the amount named therein should be paid on the receipt of the policy," held not to make a surrender of the policy a condition of payment, in view of the refusal of the insurer to pay. Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 648 (1885). Failure to surrender certificate as required, held waived by producing it at the trial. Mulroy *v.* Supreme Lodge Knights of Honor, 28 Mo. App. 463, 467 (1888). Compare Bock *v.* A. O. U. W., 75 Iowa, 462 (1888); also Crokatt *v.* Ford, 25 L. J. Ch. 552 (1855), where the insurer was decreed to pay the amount of a lost policy, without any further indemnity than the decree itself; s. p., England *v.* Lord Tredegar, 1 L. R. Eq. 344 (1866).

Any other conditions precedent created by the contract will be found treated in connection with the various topics to which they relate.

dent.[1] Finally, the happening of the event on which the liability of the insurer is by the contract to be consummated, must be alleged,[2] and, in connection with such allegation, it should be alleged that the amount in question is (wholly or in part, as the case may be) unpaid,[3] though it is not necessary to allege any demand for its payment.[4] Of course, the evidence must support and correspond to these allegations. With regard to the pleadings of the insurer, and the evidence in support thereof, they are of such infinite variety, in accordance with the exigencies of each particular case, that little can here be profitably said as to the rules governing them. Such rules must be sought in the general law of pleading and of evidence.[5]

§ 124. **The same; in case of agreement to make assessment.**—The rules of pleading and evidence just stated are, generally speaking, applicable to contracts of mutual benefit insurance. But in case of that class of contracts, already referred to, that contain an agreement to make an assessment on the members of the insuring body, and pay the sum resulting from such assessment, there have grown up certain peculiar rules of pleading and evidence, that seem to call for special consideration. It would seem competent for the parties to expressly contract that the liability of the

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[1] See, for instance, §§ 14, 93.

[2] Brooklyn Co. *v.* Bledsoe, 52 Ala. 538, 546 (1875).

[3] A complaint held fatally defective for omission of such allegation. Richards *v.* Travelers' Co., 80 Cal. 505 (1889).

[4] Excelsior Mutual Aid Assoc. *v.* Riddle, 91 Ind. 84 (1883).

[5] A provision to the effect that the validity of the policy should not be questioned after the death of the insured, and not after two years from the date of its issue, considered and sustained, as excluding the defense of fraud as well as other defenses. Wright *v.* Mutual Benefit Assoc., 118 N. Y. 237 (1890). As to effect of Ohio statute prohibiting the insurer from setting up as a defense certain errors, omissions or misstatements in the application, see Starck *v.* Union Central Co., 134 Pa. St. 45 (1890).

insurer shall be conditioned on the making of an assessment, and when such is the contract, there is no valid reason why, in accordance with the intent of the parties, the liability of the insurer should be held not to exist, in the absence of proof that such assessment has been made.[1]

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[1] Thus, where the agreement was that "an assessment for as many dollars as there are policy holders, shall be made upon all such policy holders, and the sum collected on such assessment paid," with the further provision that the payment should not exceed \$1,000, a declaration merely alleging as breach a *promise to pay* the \$1,000, was held fatally defective, on the ground that there should also have been alleged a breach to lay the assessment, or, having laid one, to pay over the amount. Curtis *v.* Mutual Benefit Co., 48 Conn. 98 (1880). To same effect, Taylor *v.* National Temperance Union, 94 Mo. 35, 40 (1887). The rule in Curtis *v.* Mutual Benefit Co. was approved in Earnshaw *v.* Sun Mutual Soc., 68 Md. 465, 472 (1888); Oriental Assoc. *v.* Glancey, 70 Md. 101 (1889); Jackson *v.* Northwestern Mutual Assoc., 73 Wis. 507, 512 (1889). So, where the agreement was to pay "the net proceeds of one full assessment upon all members in good standing at the time of the death, not to exceed \$3,000," held that an action at law would not lie for the amount, without averring or proving that such an assessment had been made, and the amount thereof. Bailey *v.* Mutual Benefit Assoc., 71 Iowa, 689 (1886). So where the agreement was that an assessment would be levied, and the sum so collected on such assessments be paid over. Newman *v.* Covenant Mutual Assoc., 72 Iowa, 242 (1887). So where the agreement was to pay the net proceeds of one full assessment. Tobin *v.* Western Mutual Aid Soc., 72 Iowa, 261 (1887; where the judgment was that the society make the proper assessment and pay the proceeds). And compare Rainsbarger *v.* Union Mutual Aid Assoc., 72 Iowa, 191 (1887); Abe Lincoln Soc. *v.* Miller, 23 Ill. App. 341, 346 (1887); York County Assoc. *v.* Myers, 11 W. N. C. (Pa.), 541 (1882). So, under an averment of a promise to pay a specific sum, evidence was held inadmissible of a certificate constituting a conditional promise to pay the amount collected by assessments. New Home Assoc. *v.* Hagler, 23 Ill. App. 457 (1887). But under an agreement to pay "a sum received from a death assessment, but not to exceed \$1,000," a complaint alleging that the assessment *was not made*, nor the amount of insurance paid, was sustained on demurrer, against the objection that the only agreement was *to pay* such sum as might be received from a death assessment, and that it was not alleged that any such sum was ever received. Some stress was, however, laid on "the other pro-

But in accordance with what seems to be, in many instances at least, a doubtful interpretation, a contract to make an assessment and pay the sum resulting, not exceeding a sum specified, has by many courts been regarded as in effect merely a contract to pay the sum specified, the assessment being presumed to be made.[1]

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visions of the contract, and the situation and manifest intention of the parties." Lawler *v.* Murphy, 58 Conn. 294 (1889).

In accordance with the rule above stated, a claim for the full amount specified, presented on the dissolution of the insuring company, was rejected for want of proof that an assessment had been made. Burdon *v.* Mass. Safety Fund Assoc., 147 Mass. 360, 367 (1888).

[1] Thus, recovery for such sum specified, without allegation or proof of breach of the agreement to make an assessment, or of the amount thereof, was allowed, where the agreement was to pay $2,000, "provided, however, that the sum thus to be paid is conditioned upon assessments made therefor, and shall in no case exceed seventy-five per cent. of the amount received therefor." Kansas Protective Union *v.* Whitt, 36 Kans. 760 (1887); Kansas Protective Union *v.* Gardner, 41 Kans. 397 (1889). See Kaw Life Assoc. *v.* Lemke, 40 Kans. 142 (1888). So, where the agreement was, "an assessment shall be made upon the holders of all certificates in force at the date of such death, and the sum collected thereon shall be paid," but no such payment to exceed $1,000. Lueders *v.* Hartford Co., 12 Fed. Rep. 465 (1882). So, where the agreement was, "an assessment for as many dollars as there are policy holders shall be made upon all such policy holders, and the sum collected on such assessment paid," but no such payment to exceed $1,000. Fairchild *v.* Northeastern Mutual Assoc., 51 Vt. 612, 628 (1879). These will suffice as examples of the form of contract, but substantially the same rule was upheld in Darrow *v.* Family Fund Soc., 116 N. Y. 537 (1889); O'Brien *v.* Home Benefit Soc., 117 N. Y. 310 (1889); Freeman *v.* National Benefit Soc., 42 Hun, 252 (1886); Peck *v.* Equitable Accident Assoc., 52 Hun, 255 (1889); Fulmer *v.* Union Mutual Assoc., 12 N. Y. State Reporter, 347 (1887); Burland *v.* Northwestern Mutual Aid Assoc., 47 Mich. 424 (1882). In Mutual Accident Assoc. *v.* Barry, 131 U. S. 101, 122 (1889), where the contract was construed as an agreement to pay the sum specified, and not an agreement to make an assessment, or that payment of any sum should be contingent on an assessment, or on its collection, certain cases cited are distinguished as "providing only for levying an assessment and paying the amount collected, or where there

§ **125. Amount of recovery.**—The contract of insurance being commonly a contract to pay a sum specified, such sum naturally measures the amount of recovery.[1] This is

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was no proof of the assessable number of members." So in Georgia Masonic Mutual Co. *v.* Whitman, 52 Ga. 419 (1874), the contract was held such as to create an obligation to pay a sum specified for each member, and not merely for such as should pay their assessments on the death of the insured.

[1] A settlement with the insurer for less than the amount specified, held invalid for fraud, and recovery allowed for the balance. McLean *v.* Equitable Soc, 100 Ind. 127 (1885). The right of the insured to recover the full amount, held not taken away by the fact of his guardian having settled in writing with the insurer for a smaller amount, under a misapprehension as to the rights of his ward. Tyler *v.* Odd Fellows' Mutual Relief Assoc., 145 Mass. 134 (1887).

In an action to set aside a fraudulent surrender of a policy, and recover the amount thereof (the insured having died), recovery was allowed, not merely for the surrender value, but for the amount insured, less premiums and interest. Whitehead *v.* N. Y. Co., 102 N. Y. 143, 156 (1886). Recovery allowed of the amount of the contract, less what had been already paid thereon by the insurer to a pledgee. Earle *v.* N. Y. Co., 7 Daly, 303; affirmed without opinion in 74 N. Y. 618 (1878).

A person held not estopped from claiming compensation from a railroad company for an injury resulting from a collision, by having been previously compensated by the railroad relief association for the injury, which he then untruthfully alleged was caused by malaria, jaundice, constipation, &c., the railroad company and the association being separate corporations, and, while the former guaranteed all contracts of the latter, the funds of the latter being sufficient to meet all liabilities likely to arise. Owens *v.* Baltimore & Ohio R. R. Co., 35 Fed. Rep. 715 (1888). The amount received by the widow of the insured under the insurance contract, held not to be deducted from the amount of recovery for damages for the wrongful act causing the death of the insured. Grand Trunk Railway Co. *v.* Jennings, 13 L. R. App. Cas. 800 (1888).

A by-law of a railroad relief association, requiring a claimant to release the railroad company from any claim for damages, before applying to the association for relief, is not against public policy, as it simply puts a claimant to his election whether he will look to the railroad company, or to the relief association, for compensation. Owens *v.* Baltimore & Ohio R. R. Co., 35 Fed. Rep. 715 (1888); State *v.* Same, 36 Fed.

now the generally accepted rule, though the doctrine of insurable interest has sometimes caused some doubt to be cast upon the soundness of it, the alleged ground of such doubt being, that as an insurable interest is necessary, recovery on the contract should not be allowed beyond the extent of such interest.[1] And, on general principles, in-

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Rep. 655 (1888); Fuller *v.* Baltimore & Ohio Relief Assoc., 67 Md. 433 (1887).

Under English statute, recovery from one insurer held to bar recovery from another insurer by the same person for the same loss. Hebdon *v.* West, 3 Best & Smith, 579 (1863). As to right of recovery being affected by fact of another claim pending against the insurer for the same amount, see Lemon *v.* Phœnix Mutual Co., 38 Conn. 294, 303 (1871).

As to right to double payment on one certificate, in case of adherence to both a loyal and a disloyal lodge, see Bock *v.* A. O. U. W., 75 Iowa, 462 (1888).

As to set-off in action on contract of insurance, see *Re* Jeffery's Policy, 20 Weekly Reporter, 857 (1872).

[1] Thus, recovery allowed for the full amount, irrespective of the cessation of the plaintiff's interest before the happening of the loss. Law *v.* London Indisputable Co., 24 L. J. Ch. 196 (1855). So the amount of recovery by an assignee is not affected by the amount of consideration paid by him for the assignment. St. John *v.* American Mutual Co., 13 N. Y. 31, 39 (1855). So a creditor is not limited to the amount of his debt, but may recover the full amount. Dalby *v.* India & London Co., 15 C. B. 365 (1854); Kennedy *v.* N. Y. Co., 10 La. Ann. 809 (1855); Trenton Mutual Co. *v.* Johnson, 4 Zabr. (N. J.), 576 (1854); Swick *v.* Home Co., 2 Dillon, 160 (1878). On this point Dalby *v.* India & London Co., above, overruled Godsall *v.* Boldero, 9 East, 72 (1807). So a tenant having only a life interest, who had insured the life of his landlord, was allowed to recover the full amount, regardless of the expiration of the tenancy, and without reference to the value of his interest. Sides *v.* Knickerbocker Co., 16 Fed. Rep. 650 (1883). The doctrine stated in the text is also supported in Miller *v.* Eagle Co., 2 E. D. Smith, 268, 302 (1854); Hoyt *v.* N. Y. Co., 3 Bosw. 440, 446 (1858); Olmsted *v.* Keyes, 85 N. Y. 593, 598 (1881); Brummer *v.* Cohn, 86 N. Y. 11, 14 (1881; a case of a wife's interest in her husband's life); Wright *v.* Mutual Benefit Assoc., 118 N. Y. 237, 244 (1890); Scott *v.* Dickson, 108 Pa. St. 6, 14 (1884); Chisholm *v.* National Capitol Co., 52 Mo. 213 (1873); Robert *v.* New England Mutual Co., 2 Disn. (Ohio), 106, 111 (1858).

terest is allowable as part of the amount of recovery on the contract.[1] Sometimes the amount of the recovery, instead of being absolutely fixed,[2] is made to depend on a contin-

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See also, Grattan *v.* National Co., 15 Hun, 74, 77 (1878); Goodwin *v.* Mass. Mutual Co., 73 N. Y. 480, 497 (1878). Compare Bevin *v.* Conn. Mutual Co., 23 Conn. 244 (1854).

[1] The contract of insurance being a contract to pay money at a certain time, interest is allowable thereon from the time it is due. Supreme Lodge A. O. U. W. *v.* Zuhlke, 129 Ill. 298 (1889; allowing it from date of notice of loss). So under Missouri statute. Brown *v.* Railway Passenger Co., 45 Mo. 221 (1870). To the contrary, Higgins *v.* Sargent, 3 Dowling & Ryland, 617 (1823); and see Parken *v.* Royal Exchange Co., 8 Scotch Session Cases, 2d series, 365 (1846). But in default of evidence as to when the proofs were submitted, interest was allowed only from the commencement of the action. Chase *v.* Phœnix Mutual Co., 67 Me. 85, 92 (1877); Trager *v.* Louisiana Equitable Co., 31 La. Ann. 235, 242 (1879). An assignee of the contract held entitled to interest only from the time when he was in a position to give the insurer a full legal discharge upon payment of the claim. Toronto Savings Bank *v.* Canada Co., 14 Grant's Chancery (U. C.), 509 (1868). In the absence of proof of demand, interest held not recoverable where the amount was not payable at any given time, and the amount payable was not a sum certain. Pierce *v.* Charter Oak Co., 138 Mass. 151, 163 (1884). As to statute allowing damages for vexatious delay in paying, see Brown *v.* Railway Passenger Co., 45 Mo. 221, 227 (1870); Merritt *v.* Cotton States Co., 55 Ga. 103, 111 (1875); Lester *v.* Piedmont & Arlington Co., 55 Ga. 475 (1875); Cotton States Co. *v.* Edwards, 74 Ga. 220, 230 (1884); Travelers' Co. *v.* Sheppard, 12 Southeastern Rep. 18, 22, 31 (Supm. Ct. Ga. 1890); Mutual Co. *v.* Watson, 30 Fed. Rep. 653 (1887); Hull *v.* Alabama Gold Co., 79 Ala. 93 (1887). A provision for recovery of attorney's fees held not to operate retrospectively. Piedmont & Arlington Co. *v.* Ray, 50 Tex. 511, 519 (1878).

[2] See Metropolitan Co. *v.* Drach, 101 Pa. St. 278 (1882). As to effect of a provision whereby, in case of it being shown that the insured took his life while insane, the insurer was to "pay the sum insured, or refund the premiums actually received, with interest thereon, according to its judgment of the equities of the case," especially taken in connection with a provision whereby the contract was to be void in case of suicide while insane, see Salentine *v.* Mutual Benefit Co., 24 Fed. Rep. 159 (1885). See also, as to special provision as to amount payable in case of suicide, Moore *v.* Woolsey, 4 El. & Bl. 243 (1854). As to effect of

gency, as, for instance, what may prove to be the amount of a specific fund.[1]

§ 126. **The same; in case of agreement to make assessment.**—In case of an agreement to make an assessment on the members of the insuring body, and pay the sum resulting from such assessment, it would seem, on principle, necessary for the plaintiff, in order to recover more than nominal damages, not only to show that such assessment has been made, but to show the amount thereof. As we have seen, however, such an agreement is by many courts construed to be merely a contract to pay the sum specified,

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agreement that, in case of default in payment of premiums, "then in every such case the said company shall not be liable for the payment of the whole sum assured, but only for an amount proportionate to the number of premiums paid," see Mutual Co. *v.* Bratt, 55 Md. 200 (1880). As to recovery for loss of time and profit, in case of injury where the amount of damages is left open, see Theobald *v.* Railway Passenger Co., 10 Exch. 45 (1854). As to difference in amount of indemnity, as depending on classification of occupations, see Bushaw *v.* Women's Mutual Co., 8 N. Y. Suppl. 423 (1889); Aldrich *v.* Mercantile Mutual Assoc., 149 Mass. 457 (1889).

[1] Thus, in a contract of benefit insurance, the recovery was limited to a certain sum for each certificate in force when the amount became due. Kerr *v.* Minnesota Assoc., 39 Minn. 174 (1888). As to recovery being limited to assessments of a particular class of members, see Old Wayne Mutual Assoc. *v.* Nordby, 122 Ind. 446 (1890). See also, as to limitation of remedy to specific property, Wadsworth *v.* Jewelers' & Tradesmen's Co., 9 N. Y. Suppl. 711 (1890); Law *v.* London Indisputable Co., 24 L. J. Ch. 196 (1855). As to agreement whereby the insured obtains a lien on a particular fund, see *Re* British Imperial Co., 47 L. J. Ch. 318 (1878). The safety fund of a benefit society held, under the terms of the contract, for the benefit of living certificate holders, and not applicable to the payment of death claims; and, upon the dissolution of the society, it was divided among the holders of certificates in force, in the proportion which the amount of each certificate bore to the amount of the whole number of certificates in force. Burdon *v.* Mass. Safety Fund Assoc., 147 Mass. 360, 368 (1888). And see, generally, as to effect of an agreement to make an assessment, § 126.

the assessment being presumed to be made. But the presumption that the assessment has been made, does not necessarily involve any presumption as to the *amount* of such assessment, and hence some courts that have been willing to admit the presumption that the assessment has been made, have declined to go further and admit any presumption as to the amount of the assessment; that is to say, the plaintiff in such case, in the absence of evidence as to the amount of the assessment, is confined to nominal damages.[1] But other courts admit in such case, not only

[1] Thus, under an agreement to pay "a sum equal to the amount received from one death assessment, but not to exceed $5,000." Ball *v.* Granite State Assoc., 64 N. H. 291 (1886); S. P., Taylor *v.* National Temperance Union, 94 Mo. 35, 41 (1887; dictum). To same effect seems Martin *v.* Equitable Accident Assoc., 55 Hun, 574 (1890), where judgment for the plaintiff for the full amount specified, was reversed on the ground of absence of evidence as to the amount of the assessment. So in an action for failure to levy an assessment. Cram *v.* Equitable Accident Assoc., 9 N. Y. Suppl. 462 (1890). And the same doctrine is recognized in O'Brien *v.* Home Benefit Soc., 117 N. Y. 310 (1889). But see Jackson *v.* Northwestern Mutual Assoc., 73 Wis. 507, 512 (1889).

In such case the evidence sufficient to make proper a recovery for more than nominal damages, must depend on the circumstances of each particular case. In O'Brien *v.* Home Benefit Soc., 117 N. Y. 310 (1889), the plaintiff introduced in evidence the official statements filed by the insurer with the insurance department for two years, showing the numbers, dates and amounts of outstanding certificates, the ages of the persons insured, &c. He also proved by the secretary of the insurer the correctness of such statements, and also proved by an insurance expert that an assessment on the certificates in force liable to assessment, would have produced more than double the amount specified in the certificate in question. A recovery for such amount was sustained. Compare St. Clair Co. Benev. Assoc. *v.* Fietsam, 97 Ill. 474 (1881), where, the recovery being by the contract limited to a certain sum for each member of a certain class "at the time of such payment," parol evidence was, against the objection of the insurer, admitted to show the number of members, and, in view of the provisions of the contract, the "time of payment" was held to be the time of the death of the insured. See also, Taylor *v.* National Temperance Union, 94 Mo. 35, 41 (1887); Earnshaw *v.* Sun

the presumption that the assessment has been made, but also the presumption that such assessment produced the full amount specified in the contract, leaving it to the insurer to show by way of defense that the assessment failed to produce, or would have failed to produce, such full amount.[1] This on the ground that the facts respecting

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Mutual Soc., 68 Md. 465, 472 (1888); Oriental Assoc. *v.* Glancey, 70 Md. 101 (1888).

[1] Kansas Protective Union *v.* Whitt, 36 Kans. 760 (1887); Kansas Protective Union *v.* Gardner, 41 Kans. 397 (1889); Lueders *v.* Hartford Co., 12 Fed. Rep. 465 (1882); Suppiger *v.* Covenant Mutual Benefit Assoc., 20 Bradw. (Ill.), 595, 599 (1886); Northwestern Benev. Assoc. *v.* Wanner, 24 Ill. App. 357 (1887); Elkhart Mutual Aid Assoc. *v.* Houghton, 103 Ind. 286 (1885); Bentz *v.* Northwestern Aid Assoc., 40 Minn. 202 (1889); Lawler *v.* Murphy, 58 Conn. 294, 314 (1889). In Fairchild *v.* Northeastern Mutual Assoc., 51 Vt. 612, 628 (1879), it was left undecided, whether it was necessary for the plaintiff to prove the number of members, but the statements of such number, as contained in the notices of assessment sent to the insured, were held to furnish sufficient evidence that there were 1,000 members, to sustain the judgment. So, where the contract was to pay $2,000, but with the proviso that if, at the time of the death of the beneficiary, there should be less than 2,000 members in his class, there should be paid only one dollar for each member in good standing in that class, he was held restricted to the fund yielded by the assessments laid upon the members of that class. But it was held that the number of members was peculiarly within the knowledge of the society, and that the insured was not bound to aver that there were 2,000 members of the class in question; that he made a *prima facie* case, by pleading the certificate, performance on his part and on that of the insured, death of the insured, and failure of performance on the part of the insurer. Supreme Lodge Knights of Pythias *v.* Knight, 117 Ind. 489 (1888). And the insured was held limited to the fund yielded by the assessments, notwithstanding that the society, by establishing a new class, and offering more advantageous terms to members who would enter it, so depleted the class to which the insured belonged, as to reduce it to 173 members, it appearing that such change was made in conformity to the by-laws and in good faith. And held that, even if such depletion was a breach of the contract with the insured, the damages were too conjectural and remote for recovery. Id. In Oriental Assoc. *v.* Glancey, 70 Md. 101 (1888), the recovery seems (though it is not

the amount produced, are peculiarly within the knowledge of the insurer.

§ 127. **Application of proceeds collected from insurer.**— Payment having been made by the insurer to the person entitled to be paid in accordance with the contract, the liability of the insurer is, ordinarily at least, at an end.[1] And sometimes the person thus paid is under no legal obligation whatever to any other person, with reference to the application of what has been thus paid. But sometimes he is, and clearly the nature and the extent of such obligation must vary greatly, in accordance with the circumstances of each particular case. Thus he may, in accordance with an agreement contained (though not necessarily) in the contract of insurance itself, hold such proceeds as a trustee. So far as he holds them upon other than a simple trust, that is, a trust involving no other interest or

clear) to have been for the maximum amount named, and an instruction that the recovery should be limited to what would have resulted from an assessment, was held properly refused, there being no evidence as to how many members were in good standing at the time of the death, or how many would have paid, if called on. In the following cases, the evidence offered by the insurer was held sufficient to make it proper to limit the recovery to the amount actually produced by the assessment. *In Re* Solidarite Assoc., 68 Cal. 392 (1886); Hesinger *v.* Home Benefit Assoc., 41 Minn. 516 (1889). Compare Kerr *v.* Minnesota Assoc., 39 Minn. 174 (1888); Old Wayne Mutual Assoc. *v.* Nordby, 122 Ind. 446 (1890). But after a *general verdict and judgment* for breach of an agreement to pay a certain sum for each benefit in force "upon which mortuary assessments are paid, provided the amount so paid shall not exceed $5,000," held error to restrict the operation of the verdict, judgment and execution, to assessments collected. Seitzinger *v.* New Era Assoc., 111 Pa. St. 557 (1886).

[1] Where a creditor accepted from the insurer, in satisfaction of his claim, less than the full amount, the personal representative of the insured was held to have no right to recover the balance from the insurer, though, after settling with the insurer, the creditor assigned his interest in the contract to such personal representative. McKenty *v.* Universal Co., 3 Dillon, 448 (1874).

duty than to pay the proceeds over to the *cestui que trust*, his obligations do not fall within the scope of this work, and must be determined in the light of the principles applicable to trusts generally.[1] But on the other hand, if he holds them upon a simple trust, with no other interest or duty except to pay them over to the *cestui que trust* on demand, he is, in accordance with well-settled principles, liable therefor in an action for money had and received,[2] but he has an equitable lien for advances, and may retain to the extent thereof; so for premiums or assessments paid, with interest.[3] What constitutes such simple trust must

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[1] As to holding as trustee amount so recovered, see Daniels *v.* Pratt, 143 Mass. 216, 222 (1887); Martin's Estate, 2 Chester Co. (Pa.), 47 (1883).

[2] Gould *v.* Emerson, 99 Mass. 154, 157 (1868); Derome *v.* Vose, 140 Mass. 575 (1886); Kimball *v.* Gilman, 60 N. H. 54 (1880). The same rule was recognized in Martin *v.* Ætna Co., 73 Me. 25, 28 (1881); Campbell *v.* New England Mutual Co., 98 Mass. 381, 400 (1867). Interest from the time the money was received from the insurer, is allowable. Evans *v.* Opperman, 76 Tex. 293, 301 (1890).

But an action was held not maintainable on the ground that the defendants had collected from the insurer *the whole* of the insurance money, to *part* of which the plaintiff was entitled. Id. (p. 298). Where a policy had been surrendered in exchange for one wherein another person was beneficiary, held that the original beneficiary could not maintain a suit for an accounting against one who had received payment of the amount of the second policy, the proper remedy being an action against the insurer on the original policy. Wheeler *v.* Mortland, 21 Ill. App. 177 (1886).

[3] Thus, where he is one to whom it has been sought to transfer the interest in the contract, in violation of the rights of the beneficiary. Weisert *v.* Muehl, 81 Ky. 336, 341 (1883); Lemon *v.* Phœnix Mutual Co., 38 Conn. 294, 302 (1871); Harley *v.* Heist, 86 Ind. 196, 204 (1882); Unity Mutual Assoc. *v.* Dugan, 118 Mass. 219 (1875); Hubbard *v.* Stapp, 32 Ill. App. 541 (1889); Pilcher *v.* N. Y. Co., 33 La. Ann. 322, 331 (1881). So in case of assignment by the beneficiary, procured by undue influence of the insured. McCutcheon's Appeal, 99 Pa. St. 133 (1881). A somewhat diffeerent rule was applied in National Co. *v.* Haley, 78 Me. 268 (1886), where the proceeds were decreed to be divided between

necessarily depend on the circumstances of each case. In this connection arises the question whether one who, by reason of want of insurable interest, had no rights under the contract as against the insurer, but whom the insurer has nevertheless paid, in accordance with the terms of the contract, is under any obligation with reference to the application of what has been thus paid. On principle it would seem that he is not. The contract being void for want of insurable interest, it is an anomaly that a legal obligation should be based on a void contract.[1]

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the representatives of the original and of the substituted beneficiary, *in proportion to* the amount of premiums paid by each of such beneficiaries.

So, in case an assignment proves invalid for want of insurable interest, the assignee has such a lien for the consideration paid for the assignment, with interest, as well as for premiums or assessments. Downey *v.* Hoffer, 110 Pa. St. 109 (1885); Wegman *v.* Smith, 16 W. N. C. (Pa.), 186 (1884); Schonfield *v.* Turner, 75 Tex. 328 (1889); Helmetag *v.* Miller, 76 Ala. 183 (1884); Basye *v.* Adams, 81 Ky. 368, 376 (1875). So of advances made on the security of the contract, with interest thereon. Warnock *v.* Davis, 104 U. S. 775, 781 (1881); Roller *v.* Moore, 10 Southeastern Rep. 241 (Supm. Ct. Va. 1889). So one originally named as beneficiary, though having no insurable interest, has such a lien. Seigrist *v.* Schmoltz, 113 Pa. St. 326 (1886).

But this right is merely a *lien* and does not imply a *right of action*. See § 85.

[1] Thus, in Worthington *v.* Curtis, 1 L. R. Ch. D. 419 (1875); Stoelker *v.* Thornton, 88 Ala. 241, 246 (1889), the representatives of the insured were held to have no claim to the insurance money as against the beneficiary, to whom the money had been paid by the insurer without dissent, though such beneficiary had no insurable interest. But contrary to these decisions are the following, where the personal representatives of the insured have been held entitled to recover the insurance money from one who, though having no insurable interest, had been paid it by the insurer. Ruth *v.* Katterman, 112 Pa. St. 251 (1886; which see as to effect of settlement between such assignee and the beneficiaries entitled); Seigrist *v.* Schmoltz, 113 Pa. St. 326 (1886); Wegman *v.* Smith, 16 W. N. C. (Pa.), 186 (1884); Kohr *v.* Wolf, Id. 189 (1885). So as against an assignee without insurable interest. Roller *v.* Moore, 10 Southeastern Rep. 241 (Supm. Ct. Va. 1889). But where the claim of the person receiving payment from the insurer, though hav-

§ 128. **The same; in case of collection by creditor of insured.**—We have seen that there is no inherent legal objection to a creditor recovering the entire amount payable by the insurer under the contract (assuming, of course, the existence of an insurable interest).[1] But the question frequently arises, whether the creditor is under any obligation to the insured, or to his representatives, with reference to the application of what has been thus paid. So far as the parties themselves have made express provision for such application, it seems generally accepted that effect will be given to such provision.[2] But in the absence of

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ing no insurable interest, is derived from *another* person (not the insured) whose claim is valid, the right of recovery is in such other person, not the representatives of the insured. Thus, where the beneficiary (not being the same person as the insured) assigned to one without interest, the representatives of the insured were held to have no right of recovery against such assignee, who had collected the insurance money. Hoffman *v.* Hoke, 122 Pa. St. 377 (1888). See also, Shaak *v.* Meily, 136 Pa. St. 161 (1890).

[1] See § 125.

[2] Thus, in accordance with the agreement of the parties, the creditor has been held entitled to retain the whole of the insurance money, as against the representatives of the insured. Rittler *v.* Smith, 70 Md. 261 (1889). So in case of insurance taken out by the insured for the benefit of the creditor. Amick *v.* Butler, 111 Ind. 578 (1887); Corson's Appeal, 113 Pa. St. 438 (1886). See Equitable Co. *v.* Hazlewood, 75 Tex. 338, 352 (1889); Washington Central Bank *v.* Hume, 128 U. S. 195, 205 (1888); Forrester *v.* Robson, 2 Scotch Session Cases, 4th series, 755 (1875). On what seems to be the same general principle, one who has effected insurance on the life of another, to secure a grant of an *annuity* by the insured, has been held entitled to the entire interest in the contract, as against the insured or his representatives, irrespective of the amount paid or payable on the annuity. Gottlieb *v.* Cranch, 4 DeGex, M. & G. 440 (1853); Knox *v.* Turner, 39 L. J. Ch. 750 (1870); Preston *v.* Neele, 12 L. R. Ch. D. 760 (1879). These decisions are, however, of the less weight as authorities on the general question, as it has been laid down that the grant of such annuity did not create the relation of *debtor and creditor*. Knox *v.* Turner, above; Preston *v.* Neele, above. Though see Courtenay *v.* Wright, below.

any such express provision, the question of such obligation is more difficult to determine. Where the contract was effected by the creditor directly with the insurer, the creditor paying the premiums, it seems generally accepted that the creditor is under no obligation to the insured, or to his representatives, with reference to such application.[1] And where the creditor, not effecting the contract himself, either obtains his interest therein from being the beneficiary under the contract,[2] as effected by the insured or another person, or is the assignee of the insured or of another person,[3] the rule still seems to be, that the creditor, if he

But in other cases the agreement has been held such that the creditor was, as against the insured or his representatives (as the case might be), entitled to retain only so much of the insurance money as would cover the amount of the debt with interest, besides premiums and consideration paid (if any). Tateum *v.* Ross, 150 Mass. 440 (1890). So, it seems, Lea *v.* Hinton, 5 DeGex, M. & G. 823 (1824); Rivers *v.* Gregg, 5 Rich. Eq. (So. Car.), 274, 287 (1853). So in case of an annuity such as is described above. Courtenay *v.* Wright, 2 Giffard, 337 (1860). So where the contract has been assigned to the creditor as collateral security merely. Page *v.* Burnstine, 102 U. S. 664 (1880). So in case of the substitution of a creditor as beneficiary in a benefit certificate. Levy *v.* Taylor, 66 Tex. 652 (1886). See also, as to right of such assignee, Gilman *v.* Curtis, 66 Cal. 116 (1884); Conway *v.* Britannia Co., 8 Lower Canada Jurist, 162 (1864). As to effect of agreement whereby payment was to be to the creditors "as their interest may appear, the balance, if any, to the wife" of the insured, see Gwynne *v.* Estes, 14 Lea (Tenn.), 662 (1885). As to provision on an assignment to a creditor, for payment of the surplus to the assignor or his representatives, after satisfying the debt, see Johnson *v.* Alexander, 25 Northeastern Rep. 706 (Supm. Ct. Ind. 1890). Under an agreement that the assignee should pay the balance to a particular person, such person held entitled, as against the representatives of the insured. Grenville *v.* Crawford, 13 Ga. 355 (1853).

[1] See note 2, p. 246.

[2] See note 2, p. 246.

[3] In Cawthorn *v.* Perry, 76 Tex. 383 (1890); Levy *v.* Gilliard, Id. 400, it seems to be broadly laid down that, as against the representatives of the insured, a creditor can retain only for the amount of his debt and interest, also for premiums paid, with interest. Here the contract

pays the premiums, is under no obligation to the insured, or to his representatives, with reference to such application. Payment of the premiums by the insured, is the circumstance usually relied on as establishing an implied agreement that the creditor, after satisfying his debt, shall pay over the balance, if any, to the insured, or to his personal representatives.[1] Yet it seems that payment of the premiums by the insured, is of itself insufficient to create such obligation on the part of the creditor; it seems that the contract must have been originally effected in pursuance of an agreement between the insured and the creditor, that it be so effected.[2] Whether or not this rule be somewhat

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was assigned to the creditor, the assignment being absolute in terms. The decisions are perhaps sustainable in accordance with the rule of construing a deed absolute in terms, to be a mortgage.

[1] Such seems to have been the case in Drysdale *v.* Piggott, 8 DeGex, M. & G. 546 (1856); Lindsay *v.* Barmcotte, 18 Scotch Session Cases, 2d series, 718 (1851). Thus, in Morland *v.* Isaac, 20 Beavan, 389 (1855), the premiums were paid by the creditor *and charged* to the debtor, who, however, never paid them. Yet the representatives of the debtor were held entitled as against the creditor.

[2] In Knox *v.* Turner, 9 L. R. Eq. 155, 167; affirmed in 39 L. J. Ch. 750 (1870), there is a dictum to the effect that, if the debtor pays the premiums on a contract effected by his creditor on the debtor's life, the debtor is, in the absence of provision to the contrary, entitled to the proceeds after payment of the debt. This seems approved in Washington Central Bank *v.* Hume, 128 U. S. 195, 209 (1888). But, as it was expressly held in Knox *v.* Turner (see note 2, p. 244), that the relation of the parties was *not* that of debtor and creditor, the point was not passed upon. And in Freme *v.* Brade, 2 DeGex & J. 582 (1858), the creditor was held entitled, as against the debtor's representatives, on the ground *that the insurance was not effected in pursuance of any contract with* the debtor. In Bruce *v.* Garden, 5 L. R. Ch. App. 32 (1869), it is stated that where "the creditor has agreed to effect a policy, and the debtor has agreed to pay the premiums, the policy will be held in trust for the debtor." Compare Holland *v.* Smith, 6 Espinasse, 11 (1806); Lewis *v.* King, 44 L. J. Ch. 259 (1875); Scott *v.* Roose, 3 Irish Equity, 170 (1841). In Courtenay *v.* Wright, 2 Giffard, 337, 351 (1860), the cases of Lea *v.* Hinton, (note, p. 245); Drysdale *v.* Piggott (note 1, above), are consid-

arbitrary and without a basis of sound reason, it has the merit of being simple and convenient, though it is desirable that the raising of questions as to its application, be in each case avoided so far as possible, by the existence of express provisions defining the obligation of the creditor, if any such obligation exists.

§ 129. **Liability of insurer for anticipatory refusal to perform.** —Sometimes, prior to the time when by the terms of a contract the liability of a party thereto to perform its conditions becomes complete, he declares in advance his intention not to perform such conditions. The question of what additional liability on his part, if any, is created by such declaration of intention, has given rise to considerable discussion, which has by no means resulted in unanimity of opinion. But, however this may be with regard to contracts generally, there seem to be, in case of contracts of insurance, certain features that make proper the position that, in some form or other, an additional liability is created on the part of the insurer, by his declaration in advance of his intention not to perform the contract.[1] And the special

ered, and the court say: "The principle to be extracted from these two cases seems to be this: where the relation of debtor and creditor subsists, and *the true construction of the instruments and the evidence of the real nature of the transaction shows that the policy of assurance was effected by the creditor as a security or indemnity,* if the debtor directly or indirectly provides money to defray the expenses of that security, he is, on a principle of natural equity, entitled to have the security delivered up to him when he pays his debt, which it was directly or indirectly at his expense effected to secure."

[1] The *mere declaration* of the insurer that it would not on the death of the insured pay him a certain sum, held not to give any right to elect to consider the contract at an end. Harlow *v.* St. Louis Mutual Co., 54 Miss. 425 (1877).

The right of action for anticipatory refusal to perform, held in the insured, who paid the premiums, instead of in the beneficiary, who was a distinct person. Abell *v.* Penn Mutual Co., 18 W. Va. 401, 419 (1881). In case of insolvency of the insurer, the insured, who had paid premiums,

feature is (as it commonly happens in case of such declaration), the refusal to receive premiums.[1] It is obvious that the continuous refusal of the insurer to receive premiums, places the insured in a somewhat inconvenient position, to say the least, as to his apparent rights. For, whereas by the terms of the contract (as is commonly the case) his rights are expressly declared forfeited for failure to pay premiums, he is, by the action of the insurer in refusing to accept premiums, forced into the position of *appearing* to have forfeited his rights by failure to so pay. And when it is also considered that the period of continuance of the contract is commonly a very long one—many years—if not a lifetime, the inconvenience of the position of the insured becomes still more obvious. Whether or not, then, the position that an *immediate* and additional liability is created on the part of the insurer by his declaration in advance, of his intention not to perform the contract, in other words, by his declaration that the contract is forfeited,—is fully justified by fundamental legal principles, there are certainly very plausible reasons for asserting that such immediate liability exists.

§ 130. **The same; insolvency of or transfer of assets by insurer.**—In case of the insuring company becoming insolvent, discontinuing its business, and by consequence becoming unable to carry its contracts, the effect upon the rights of the insured is at least as prejudicial as in case of a declaration that the contract is forfeited. And, as creating

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was allowed to recover them back, though a third person was beneficiary. Universal Co. *v.* Cogbill, 30 Gratt. (Va.), 72, 76 (1878). The right of action in a beneficiary to enforce the liability arising on anticipatory refusal to perform, held, on her death, to pass to her personal representative, whose right became thereby vested. Clemmitt *v.* N. Y. Co., 76 Va. 355, 359 (1882).

[1] As to evidence of refusal to receive premium, see Packard *v.* Conn. Mutual Co., 9 Mo. App. 469, 474.

an immediate liability on the part of the insurer, such insolvency is, as we shall see more fully, regarded as equivalent to a declaration that the contract is forfeited.[1] And the same rule applies to a transfer by the insuring company of all its assets to another company, and ceasing to do business.[2] And, in accordance with the idea of an *immediate*

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[1] People *v.* Security Co., 78 N. Y. 114, 125 (1879); Smith *v.* St. Louis Mutual Co., 2 Tenn. Ch. 727, 741 (1877). Even where the company was not technically insolvent, and its assets were sufficient to pay the policies in force, yet a suit by the policy holders to enforce the termination of their contracts, and payment of their policies, was held maintainable, on the ground that it had ceased to do business, that its premium receipts did not pay running expenses, and that its existence was continued merely to wind up its business. Ingersoll *v.* Missouri Valley Co., 37 Fed. Rep. 530 (1889). In McDonnell *v.* Alabama Gold Co., 85 Ala. 401, 408 (1888), a proceeding in equity against stockholders of an insolvent insurance company, the insured was declared to be a creditor of the company, with the right to sue for the value of the contract. But the right of a policy holder to refuse to pay his premiums, on the ground of the insolvency of the company, and to maintain a proceeding to have the company declared insolvent, was denied in Taylor *v.* Charter Oak Co., 9 Daly, 489 (1881). And an action for damages, based on allegations of the insolvency of the insuring company, was held not maintainable, where it appeared that the company was conducting its business as usual, and paying all claims against it. Black *v.* Homeopathic Mutual Co., 47 Hun, 210 (1888). In Mayer *v.* Attorney-General, 32 N. J. Eq. 815, 821 (1880), a distinction was made in case of mutual companies, it being held that, while the holders of matured policies are to be regarded as creditors, the holders of policies running at the date of insolvency are merely members, and hence are postponed in right of payment to holders of matured policies. And where, at the date of the insolvency, the risk on endowment policies had not been terminated, the holders were held not creditors, though all the premiums thereon liable to be called for, had been paid. But in Relfe *v.* Columbia Co., 76 Mo. 594 (1882), this distinction was expressly declared not to apply to a stock company.

[2] Meade *v.* St. Louis Mutual Co., 51 How. Pr. 1 (1875). So in case of a benefit society. Grayson *v.* Willoughby, 78 Iowa, 83 (1889; where the fact that the insured applied for membership in the company with which the dissolved company was consolidated, which application was refused,

liability being created in case of insolvency, it is properly held that the insured may set off the liability of the insolvent insurer on the contract of insurance, against his own liability to the insurer.[1]

§ **131. Mode of enforcing such liability.**—Assuming, then, that the declaration of the insurer that the contract is forfeited, creates an immediate liability on the part of the insurer, the mode of enforcing such liability is to be considered. The insured may, if he choose, ignore such declaration of forfeiture, and, preserving his rights by a tender of premiums and by the performance of other conditions, await the time when by the terms of the contract the liability of the insurer becomes consummated.[2] But, on the assumption of the existence of an immediate liability, and regarding the conduct of the insured as a breach of contract, it follows that the insured has also a remedy by an action at law for breach of the contract.[3] But, for various

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was held not to estop her from maintaining the action). The right to maintain such action, was denied in Barden *v.* St. Louis Mutual Co., 3 Mo. App. 248 (1877). But, as is said in Smith *v.* St. Louis Mutual Co., 2 Tenn. Ch. 727, 741 (1877): "Whatever may be the doubt at law about actions *quia timet*, there is none in equity."

[1] As, for instance, a mortgage debt. Carr *v.* Hamilton, 129 U. S. 252 (1889). Compare, under Louisiana Code, Life Assoc. of America *v.* Levy, 33 La. Ann. 1203 (1881). But such right seems denied in Ewing *v.* Coffman, 12 Lea (Tenn.), 79, 87 (1883), though the decision went on the ground of want of mutuality; also that the policy had been surrendered. And in Vanatta *v.* N. J. Mutual Co., 31 N. J. Eq. 15, 23 (1879), the insured was held not entitled to set off premiums that had been paid.

[2] Day *v.* Conn. General Co., 45 Conn. 480 (1878); Clemmitt *v.* N. Y. Co., 76 Va. 355, 360 (1882); Smith *v.* Union Central Co., 1 Cin. L. Bull. 285 (1876). As to effect of refusal to receive a premium, as excusing tender of those subsequently owing, see § 97.

[3] Day *v.* Conn. General Co., above (where, however, an action on an implied contract to receive the premiums and keep the contract of insurance in force, was held not maintainable).

reasons, such legal remedies are, in many cases at least, inadequate to produce the desired result. Hence, we find a justification for the doctrine that in case of such declaration of forfeiture, the insured may maintain a proceeding in equity to have the contract declared in force, in which case the validity of the claim of forfeiture set up by the insurer, may be determined.[1] In such proceeding it is proper to provide, as a condition of declaring the contract in force, that unpaid premiums be paid with interest.[2] And it has been held that he has the choice of a further remedy, that of having the contract declared *forfeited*.[3]

§ 132. **Rule of compensation in case of anticipatory refusal to perform.**—If, instead of electing his remedy to have the contract declared in force, the insured elect to enforce the

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[1] Day *v.* Conn. General Co., note 2, p. 250; Cohen *v.* N. Y. Mutual Co., 50 N. Y. 610, 624 (1872); Hayner *v.* American Popular Co , 36 N. Y. Super. Ct. 211 (1873); affirmed, it seems, in 62 N. Y. 620 (1875); Meyer *v.* Knickerbocker Co., 73 N. Y. 516, 524 (1878); (National) Co. *v.* Tullidge, 39 Ohio St. 240 (1883). So, it seems, in Appleton *v.* Phœnix Mutual Co., 59 N. H. 541 (1880). In Mausbach *v.* Metropolitan Co., 53 How. Pr. 496 ; affirmed as Mansbach *v.* Same, 17 Hun, 340 (1879), the action was sustained, even in the absence of proof that the tender by plaintiff had been kept good. As to whether it may be decreed in the alternative, that sums paid on the contract may be returned, see Cohen *v.* N. Y. Mutual Co., above ; but it was held error to adjudge as alternative relief, the issuing of a paid-up policy in accordance with the provisions of the original policy. Hayner *v.* American Popular Co., above.

[2] Meyer *v.* Knickerbocker Co., 73 N. Y. 516, 528 (1878). See Hayner *v.* American Popular Co., 69 N. Y. 435 (1877).

[3] Union Central Co. *v.* Pottker, 33 Ohio St. 459 (1878). But the right to such remedy may be lost by delay. Howland *v.* Continental Co., 121 Mass. 499 (1877 ; eleven months' delay held to have such effect); Wilmot *v.* Charter Oak Co., 46 Conn. 483 (1878; where an additional premium became due between the time of the attempted forfeiture, and the time when the insured gave notice of his intention to treat the contract as forfeited).

contract as creating an immediate liability, the rule of compensation (applicable, as we shall see, whether the liability is enforced in a legal, or in an equitable, proceeding)[1] undoubtedly is, that he obtain what will, as nearly as may be, place him in as good a position as if the breach of obligation had not occurred. This can be done by allowing him as compensation, what it would cost him to replace the broken contract by another of equal value, with a responsible insurer, for the same amount of insurance, and at the same rate of premium;[2] a rule that seems preferable to the one laid down in some decisions, that the rule of compensation is the amount of premiums already paid, with interest.[3] Nor is the determination of such compen-

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[1] Thus, in case of an equitable proceeding against an insolvent company.

[2] So in an action at law on the contract. Speer *v.* Phœnix Mutual Co., 36 Hun, 322 (1885). And in proceedings against an insolvent company. People *v.* Security Co., 78 N. Y. 114, 125 (1879); Smith *v.* St. Louis Mutual Co., 2 Tenn. Ch. 727, 741 (1877; said in Ewing *v.* Coffman, 12 Lea, 79, 84, to have been affirmed by the Supreme Court); Universal Co. *v.* Binford, 76 Va. 103, 110 (1882); Bell's Case, 9 L. R. Eq. 706 (1870); Holdich's Case, 14 L. R. Eq. 72 (1872). So in an action for conversion of the policy. Barney *v.* Dudley, 42 Kans. 212 (1889). And the same rule seems laid down in effect in the following cases, where the rule of compensation was declared to be the value of the contract, to be ascertained by the ordinary tables. Lovell *v.* St. Louis Mutual Co., 111 U. S. 264 (1884; a case of transfer of assets to another insurer); McDonnell *v.* Alabama Gold Co., 85 Ala. 401, 408 (1888; a case of insolvency; value declared to be "surrender or equitable value"). And interest is to be added to such value. Lovell *v.* St. Louis Mutual Co., above.

[3] Such rule was repudiated in Lovell *v.* St. Louis Mutual Co., above; Speer *v.* Phœnix Mutual Co., 36 Hun, 322 (1885); but was applied in McCall *v.* Phœnix Mutual Co., 9 W. Va. 237 (1876); American Co. *v.* McAden, 109 Pa. St. 399 (1885; with interest, at least from date of demand); Alabama Gold Co. *v.* Garmany, 74 Ga. 51, 58 (1884; with interest from time of each payment). So, it was applied in a proceeding in equity to declare the contract forfeited. Union Central Co. *v.* Pottker, 33 Ohio St. 459 (1878). So, where the breach consisted of the trans-

sation prevented by the fact of the existence of contingent interests in the contract, at least where the value of such interests is susceptible of ascertainment in accordance with existing rules.[1] Such compensation is, of course, to be determined with reference to the time of the breach of the contract on the part of the insurer.[2] Obviously such a new contract could only be obtained by payment of a higher rate of premium; hence, the difference between the premiums payable on the old contract, and those payable on the new, is the proper compensation. Such difference can, for the purpose of determining the extent of the liability of the insurer, be ascertained by calculating the

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fer of the assets of the insurer to another insurer, and the discontinuance of its business. Meade *v.* St. Louis Mutual Co., 51 How. Pr. 1 (1875); Grayson *v.* Willoughby, 78 Iowa, 83 (1889), in which latter case, however, the decision seems to have turned upon a supposed distinction between mutual benefit and other insurance. And this rule of compensation seems approved in Appleton *v.* Phœnix Mutual Co., 59 N. H. 541, 547 (1880); True *v.* Bankers' Assoc., 47 Northwestern Rep. 520 (Supm. Ct. Wis. 1890). In Braswell *v.* American Co., 75 N. C. 8 (1876), it seems to be regarded as optional with the insured, to claim damages according to either rule. Compare Hall *v.* Reserve Mutual Co., 51 How. Pr. 8, note. In McKee *v.* Phœnix Co., 28 Mo. 383 (1859), the insured was held entitled to recover back "all the money she had paid under" the contract, but in Tutt *v.* Covenant Mutual Co., 19 Mo. App. 677 (1885), the rule of damages in such case was regarded as doubtful. See, as to effect of rule allowing recovery back of premiums, where payment of premiums was made in depreciated currency, Alabama Gold Co. *v.* Garmany, 74 Ga. 51, 55 (1884).

[1] As, for instance, the tables in use. Carr *v.* Hamilton, 129 U. S. 252, 256 (1889; a case of an endowment policy, the insurer being insolvent). To the contrary, Newcomb *v.* Almy, 96 N. Y. 308 (1884).

[2] In case of insolvency of the insurer, the date on which such insolvency occurred, as adjudged by the decree, and not the date of the decree itself, held to fix the time to which the claims must be referred for adjustment. Mayer *v.* Attorney-General, 32 N. J. Eq. 815, 824 (1880). In Burdon *v.* Mass. Safety Fund Assoc., 147 Mass. 360, 368 (1888), the date of the filing of the bill for dissolution was held to fix the time.

present value of the premiums payable on the old contract, and the present value of those payable on the new, and deducting the former sum from the latter.[1] This calculation should obviously be based, so far as practicable, on the supposition of an equality of kind between the new and the old; thus, if the old contract is evidenced by a non-participating policy, it would be obviously erroneous to assume the new to be a participating policy, which would, of course, imply a higher rate of premium.[2] But the rules of calculation thus stated assume that there has been no change in the subject of the risk, other than that which arises from the advance of age, and, in the absence of evidence to the contrary, it will be assumed that there has been no other change.[3] But if from accident, illness, or other cause, there have been other changes in the subject of the risk, such as would make necessary the payment of a still higher rate of premium, as a consideration

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[1] Speer *v.* Phœnix Mutual Co., 36 Hun, 322 (1885); People *v.* Security Co., 78 N. Y. 114, 125 (1879); Smith *v.* St. Louis Mutual Co., 2 Tenn. Ch. 727, 741 (1877); Universal Co. *v.* Binford, 76 Va. 103, 110 (1882); Barney *v.* Dudley, 42 Kans. 212 (1889). And in case of insolvency of the insurer, the time at which the age of the insured was to be taken, for the purpose of estimating the amount of damage, was held to be the expiration of the period covered by the last premium, payable and paid before the winding up order. Bell's Case, 9 L. R. Eq. 706 (1870). In People *v.* Security Co. (p. 127), above, the rule was applied to an unmatured paid-up policy, as well as to other unmatured policies. See Universal Co. *v.* Binford, 76 Va. 103, 112 (1882).

[2] Such error was held one calling for reversal. Universal Co. *v.* Binford, above. And where the broken contract was itself evidenced by a participating policy, dividends due were deducted in computing the premiums. N. Y. Co. *v.* Clemmitt, 77 Va. 366, 372 (1883). See, however, Holdich's Case, 14 L. R. Eq. 72, 84 (1872). In Bell's Case, 9 L. R. Eq. 706 (1870), no difference was made in case of participating policies, save that the dividends declared, but not paid, were added to the sum originally insured, and the total taken as the sum insured, for the purpose of the estimate.

[3] Bell's Case (p. 719), above.

for the new contract, evidence of such other changes is proper to consider, in determining the amount of compensation;[1] but what is the amount of such change, is obviously a question of fact, to be determined with reference to the circumstances of each particular case. And in case of a life no longer insurable, the rule of compensation based on difference of premiums is clearly inapplicable; in such case the rule would seem to be, to take the amount specified in the contract, as presumptively the measure of compensation, deducting therefrom the present value of premiums payable, as nearly as they may be calculated in accordance with existing rules of calculation, and with reference to the circumstances of each particular case.[2] But in case of the death of the insured pending the proceedings for determination of his claim, the amount specified may be regarded as an amount due at a specified time (for instance, at the expiration of a certain time after furnishing proofs of loss), and the present value, as of the date of the repudiation, can be readily calculated.[3]

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[1] Bell's Case, 9 L. R. Eq. 706, 719 (1870); Barney *v.* Dudley, 42 Kans. 212 (1889).

[2] In People *v.* Security Co., 78 N. Y. 114, 127 (1879), there is a dictum that the rule applied to lives still insurable, must also be applied to lives no longer insurable. But in Speer *v.* Phœnix Mutual Co., 36 Hun, 322 (1885), the rule of compensation is in general terms declared to be the actual value of the contract at the time of breach, as a valid and obligatory claim against an entirely responsible insurer. Compare Barney *v.* Dudley, above.

[3] People *v.* Security Co., 78 N. Y. 114, 129 (1879); People *v.* Knickerbocker Co., 40 Hun, 44 (1886); Clemmitt *v.* N. Y. Co., 76 Va. 355, 363 (1882). See also, Bell's Case, 9 L. R. Eq. 706, 724 (1870). But deduction should be made for unpaid premiums. Attorney-General *v.* Guardian Mutual Co., 82 N. Y. 336 (1880). But where the claim had been valued as a running one, and the insured afterward died, an application for a re-valuation of his claim as a death claim, was refused on the ground that it came too late, and should not be permitted to the prejudice or confusion of proceedings that had taken place. People *v.* Knickerbocker Co., 38 Hun, 601 (1886).

§ 133. Rescission by insured for fraud or mistake.—The rules applicable to the rescission of contracts for fraud or mistake, seem, generally speaking, applicable to contracts of insurance, so far, at least, as concerns rescission by the insurer.[1] Thus, that fraud cannot, ordinarily at least, be predicated of a mere promise, as distinguished from representations of an existing fact;[2] so, that the right of rescission may be lost by delay.[3] Although the right of rescission is primarily in the insured, yet it seems to be otherwise, if he is not a party to the contract of insurance.[4] In accordance with the general rule, that on rescission of a contract the party rescinding is to be placed as nearly as may be in the same situation as if the contract had not been entered into, the proper judgment, if the rescission is allowed, is ordinarily for premiums paid, with interest.[5]

§ 134. Rescission by insurer for fraud or mistake.—There seems to be no valid reason why the rules applicable to the rescission of contracts for fraud or mistake, should not also

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1 Thus, for fraudulent representations as to the solvency of the insurer. New Era Assoc. *v.* Weigle, 128 Pa. St. 577 (1889). See, however, Life Assoc. of Texas *v.* Goode, 71 Tex. 90 (1888). And the insured, having rescinded the contract on the ground of false and fraudulent representations of the agent of the insurer, was allowed to maintain an action against such agent for such representations. Hedden *v.* Griffin, 136 Mass. 229 (1884).

2 Hale *v.* Continental Co., 12 Fed. Rep. 359 (1882), where the alleged misrepresentations were as to the amount of profits to be derived from an endowment policy. But to the contrary seems U. S. Co. *v.* Wright, 33 Ohio St. 533 (1878). In Hale *v.* Continental Co., however, the bill was retained to take an account of profits.

3 So in case of mistake. Plympton *v.* Dunn, 148 Mass. 523 (1889).

4 North America Co. *v.* Wilson, 111 Mass. 542 (1873); Trabrandt *v.* Conn. Mutual Co., 131 Mass. 167 (1881); U. S. Co. *v.* Wright, 33 Ohio St. 533 (1878). See Knickerbocker Co. *v.* Heidel, 8 Lea (Tenn.) 488, 498 (1881).

5 So decreed in Hedden *v.* Griffin (note 1, above). See N. Y. Co *v.* Fletcher, 117 U S. 519 (1886).

apply to a rescission sought by the insurer.[1] And here again the rule that fraud cannot ordinarily be predicated of a mere promise, is applicable.[2] Where, however, in the course of a suit for such rescission, an interlocutory application is made to enjoin the insured from bringing an action at law on the contract, the general rules governing the discretion of the court as to granting or refusing such an application, apply; hence the rule is to deny the application, if, on the whole, it appear that the question would be more suitably tried in a court of law, for instance, before a jury.[3] And the court before which the suit for rescission is pending, will, ordinarily at least, act on the basis of the judgment at law and not disturb it. In such case the matter of costs will ultimately be the only one to be provided for in the suit in equity.[4]

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[1] Hoare *v.* Bremridge, 14 L. R. Eq. 522 (1872); Globe Mutual Co. *v.* Reals, 50 How. Pr. 237 (1875). Thus, rescission has been decreed, or a suit therefor sustained, for fraudulent statements in the application. Maine Benefit Assoc. *v.* Parks, 81 Me. 79 (1888); Traill *v.* Baring, 4 De Gex, J. & S. 318 (1864); British Equitable Co. *v.* Great Western Ry. Co., 38 L. J. Ch. 132, 314 (1868-9); N. Y. Co. *v.* Parent, 3 Quebec L. R. 163 (1876); N. Y. Co. *v.* Talbot, Id. 168 (1876). So where the suit was brought after the death of the insured. Scottish Equitable Soc. *v.* Buist, 14 Scottish L. Rep. 635; affirmed in 15 Id. 386 (1878).

[2] Conn. Mutual Co. *v.* Bear, 26 Fed. Rep. 582 (1886). The contrary case of Conn. Mutual Co. *v.* Home Co., 17 Blatchf. 142 (1879), must be regarded as unsound. Here, where the contract provided that it should be void, if the insured should become so far intemperate as to impair his health, held that a suit for cancellation would lie on the ground of his having become so intemperate. This was, however, a case of a *mutual* company, and the decision is on the ground of the duty to *other policy holders*.

[3] Scottish Amicable Soc. *v.* Fuller, 2 Irish Rep. (Equity), 53 (1867). So held, where the action at law was commenced immediately after the commencement of the suit in equity. Hoare *v.* Bremridge, 14 L. R. Eq. 522 (1872); Life Assoc. of Scotland *v.* McBlain, 9 Irish Rep. (Equity), 176 (1875); Hancock *v.* Macnamara, 2 Id. 486 (1868).

[4] Hoare *v.* Bremridge, 8 L. R. Ch. App. 22 (1872); affirming 14 L. R. Eq. 522.

§ 135. Recovery back of amount paid by insurer.—The rules applicable to the recovery back of money obtained by fraud, seem, generally speaking, applicable to payments by the insurer.[1] But this does not enable such recovery back merely on the ground of facts constituting a breach of the contract, of which the insurer might have availed himself as a defense to an action on the contract.[2]

§ 136. Recovery over by insurer.—The right of recovery over by the insurer against another than the person to whom payment has been made, must, where it exists, depend on the special provisions of the agreement. But, apart from such agreement, there is no rule of law to sustain the right of the insurer to recover against a person whose wrongful act caused the loss insured against, and which the insurer has been compelled to pay.[3]

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[1] National Co. *v.* Minch, 53 N. Y. 144 (1873); 5 T. & C. 545 (1874); Northwestern Mutual Co. *v.* Elliott, 10 Ins. L. J. 333 (1880; false representations of death); Bolton *v.* Bolton, 73 Me. 299, 306 (1882); Lefevre *v.* Boyle, 3 Barn. & Ad. 877 (1832). Recovery back allowed of insurance money paid under mistaken supposition of both parties that the insured was dead, but the contract of insurance restored as an existing one. North British & Mercantile Co. *v.* Stewart, 9 Scotch Session Cases, 3d series, 534 (1871). As to equitable relief to insurer against judgment at law, on ground of fraud, see Trefz *v.* Knickerbocker Co., 10 Ins. L. J. 590 (1881).

[2] Metropolitan Co. *v.* Harper, 5 Reporter, 490 (1878; breach of warranty).

[3] Conn. Mutual Co. *v.* N. Y. & New Haven R. R. Co., 25 Conn. 265 (1856); (Mobile) Co. *v.* Brame, 95 U. S. 754 (1877).

APPENDIX OF FORMS.

I. Forms of Policies.

(A). Form of Policy issued by the New England Mutual Life Insurance Company, of Boston, Mass. (endowment policy).

This Policy of Insurance Witnesseth that the New England Mutual Life Insurance Company, in consideration of the payment of *two hundred and sixty-five* Dollars and Cents, this day made by — *John Doe*, — of *Boston*, — in the State of *Massachusetts*, — being the Assured in this Policy, and of the punctual payment of a like sum to be made in the same manner to them, at their office in Boston, or to their Agent duly authorized, on or before the — *first* — day of — *May*, — in every year until *forty* annual premiums shall have been paid, or during his life, if his decease shall happen within *forty* years from the date hereof, do promise and agree to pay, at their office in Boston, the amount of *ten thousand* Dollars, in lawful money of the United States, to the said — *John Doe*, — at the end of *forty* years from the date hereof, or if said — *John Doe* — shall decease before that date, then — *to his wife, Mary H. Doe, if she shall survive him, otherwise* — to his executors or administrators, upon receipt of satisfactory proof of his death, after deducting therefrom all indebtedness of the party assured to the Company, together with the residue, if any, of the year's premium.

This Policy is issued by the Company, and accepted upon the following express conditions:

That the statements and declarations made in or attached to the application for this Policy, which are hereby referred to as the basis of this contract, and are a part thereof, and on the faith of which it is issued, are in all respects true, and that no fact has been suppressed relating to the health or circumstances of the insured, affecting the interests of said company, or their inducement to accept the risk.

The insured may reside in the United States and its Territories (except in localities where yellow fever is prevailing at the time as an epidemic), and in the British Provinces, and travel in and make passages along the coasts thereof; and may go to, return from, reside and travel in, Europe, the West Indies (between the months of November and May inclusive), and the Islands of the Pacific Ocean.

The insured may, without previous notice to the Company, go and remain beyond the above limits (except where yellow fever is prevailing as an epidemic); or may engage in any military or naval service; or engage in voyages upon the high seas as an occupation; or in blasting, mining, or submarine operations; or in the production or manufacture of highly inflammable or explosive substances; or in working a steam-engine, on land or water, as engineer or fireman, or in a similar capacity; or as an employee on any railroad train; but in such case he shall pay for remaining beyond the above limits of residence and travel, or for the risk of military or naval service in time of war, or for any of said occupations, an extra premium, equal to that charged by the Company in similar cases, which, if not paid at the time of the assumption of the risk, shall not invalidate this contract, but shall be a lien upon the Policy, and deducted therefrom, with interest, upon its payment.

Any assignment of this Policy shall be void unless assented to in writing by said Company, but the Policy shall not be invalidated thereby.

In case of any indebtedness due to this Company from the assured, this Policy and all sums due thereunder, are hereby pledged to secure said indebtedness, and the Company shall have a lien therefor on this Policy; and said debt or demand may be set off against the amount due thereon.

This Policy is payable only at the office of the Company at Boston, from which it is issued, and is a Massachusetts contract; and as to its conditions, restrictions, and agreements, and as to the validity of any assignments thereof, shall be governed by the law of Massachusetts.

The loss shall be payable whenever satisfactory proof thereof shall have been furnished at the office in Boston, by the sworn certificate of the Attending Physician, if there were any, and the full and particular statement, under oath, of at least one competent and disinterested witness, stating the time, place, cause, and circumstances of the death of the insured.

No suit shall be brought against the Company on any claim under this Policy, unless said suit is commenced within Two years from the time when the right of action accrues, and also within Three years from the termination of the life insured.

This Policy shall not take effect until the first premium is actually paid, and the Agents are not authorized to deliver the Policy to the assured until such payment has been made.

General Agents appointed directly by the Company are alone authorized to receive premiums on the day when payable, and not afterwards, but cannot give credit, or make, alter, or discharge contracts, or waive forfeitures, and no alteration or waiver of the conditions of this Policy shall be valid unless made in writing at the office in Boston, and signed by the President or Secretary.

All premiums due under this Policy shall be paid in advance; but any annual

premium may, at the election of the assured, be paid in cash, either in one sum, or in semi-annual or quarterly instalments, to be secured by the notes of the assured; it being understood that the Company assumes no risk for the period covered by such deferred payments, but only for that portion of the year for which the premium shall have been actually paid IN CASH, in advance; and that in case of loss all such deferred payments are to be deducted from the amount payable.

This Policy shall be void if the insured shall die in, or in consequence of a duel, or by the hands of justice, or in the violation of, or attempt to violate, any criminal law of the United States, or of any State or country in which the insured may be.

This Policy shall be void if the insured shall die by his own hand or act, whether sane or insane, within three years from the date hereof, but the Company agrees to pay upon the Policy thus voided the net reserve held against it, reckoned according to the legal standard of Massachusetts.

This Policy is issued subject to the provisions of "The Massachusetts Insurance Act of eighteen hundred and eighty-seven, Section 76."

In Witness Whereof, the said NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY have, by their President or Vice-President, and Secretary, signed and delivered this Contract at Boston, in the Commonwealth of Massachusetts, this day of in the year one thousand eight hundred and eighty-

, *President.*

, *Secretary.*

This Policy is not valid till countersigned by the Assistant Secretary or Policy Clerk.

[On the back of this policy is indorsed in full § 76 of the Massachusetts Insurance Act of 1887, besides the following matter, to which is appended a table showing cash-surrender and paid-up values under the Statute.]

Under the provisions of the Statute, a copy of which is printed on this policy, the holder thereof will be entitled to a cash-surrender value, or to paid-up insurance for the amounts stated below; where there is any indebtedness to the Company it will be deducted from the surrender value, if paid in cash, or, if paid-up insurance is taken, the amount thereof will be diminished proportionally by deducting the indebtedness from the reserve before ascertaining the premium on which the calculation for paid-up insurance is made.

(B). Form of Policy issued by the Mutual Life Insurance Company of New York ("twenty-year distribution policy").

In consideration of the application for this Policy, which is hereby made a part of this Contract, The Mutual Life Insurance Company of New York promises to pay at its Home Office, in the City of New York, unto of in the County of State of executors, administrators or assigns, Dollars, upon acceptance of satisfactory proofs at its Home Office of the death of during the continuance of this Policy, upon the following condition, and subject to the provisions, requirements and benefits stated on the back of this Policy, which are hereby referred to and made part hereof:

The annual premium of Dollars and Cents shall be paid in advance, on the delivery of this Policy, and thereafter to the Company, at its Home Office in the City of New York, on the day of in every year during the continuance of this Contract.

In Witness Whereof, the said The Mutual Life Insurance Company of New York has caused this Policy to be signed by its President and Secretary, at its office in the City of New York, the day of A. D. one thousand eight hundred and ninety-

, *President.*

, *Secretary.*

PROVISIONS, REQUIREMENTS AND BENEFITS.

Payment of Premiums.—Each premium is due and payable at the Home Office of the Company in the City of New York; but will be accepted elsewhere when duly paid in exchange for the Company's receipt signed by the President or Secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by non-payment of premium, all payments previously made shall be forfeited to the Company except as hereinafter provided.

Dividends.--This policy is issued on the Twenty Year Distribution Plan. It will be credited with its distributive share of surplus apportioned at the expiration of twenty years from the date of issue. Only twenty year distribution policies in force at the end of such term, and entitled thereto by year of issue shall share in such distribution of the surplus; and no other distribution to such policies shall be made at any previous time. All surplus so apportioned may be applied at the end of such period to purchase additional insurance, or in payment of future premiums on this policy, if requested in writing; or may then be drawn in cash. After the expiration of the period of twenty years herein above provided for, the dividend distribution periods shall be changed to terms of five years each during the continuance of this policy. The surplus may be applied at each distribution to purchase additional insurance without medical examination, provided such application of the surplus be elected in due form not less than two years before the end of the first dividend period of twenty years; otherwise a satisfactory examination will be required for each such application of the surplus. But should the owner of the policy at the end of said first period of twenty years or at the end of any subsequent period of five years elect to receive the dividends annually, the surplus applicable on this policy will thereafter be apportioned at the beginning of each year on the anniversary of the date of this policy and may be applied as hereinbefore provided.

Paid-Up Policy.—After three full annual premiums have been paid upon this policy, the Company will, upon the legal surrender thereof before default in payment of any premium, or within six months thereafter, issue a non-

participating policy for paid-up insurance payable as herein provided, for the amount required by the provisions of the Act of May 21, 1879, Chap. 347, Laws of the State of New York.

Surrender.—This policy may be surrendered to the Company at the end of the said first period of twenty years, and the full reserve computed by the American Table of Mortality and four per cent. interest, and the surplus as defined above, will be paid therefor in cash.

Insurance with Annuity.—If the policy be surrendered at the end of the first dividend period as above provided, the Company will, if requested in writing, apply its cash value, including surplus, or any part of such value, to purchase, without medical examination, a paid-up policy for the same amount as the value so applied, securing insurance for life and participating annually in dividends, together with a paid-up annuity for life equal to three and one-half per cent. per annum of the amount of the paid-up insurance, payments of the annuity to commence one year after the end of said first dividend period.

Incontestability.—It is hereby further promised and agreed that after two years from the date hereof, the only conditions which shall be binding upon the holder of this policy are that he shall pay the premiums, at the times and place and in the manner stipulated in said policy, and that the requirements of the Company as to age, and Military or Naval Service in time of war, shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed.

Notice to the Holder of this Policy.—No Agent has power on behalf of the Company to make or modify this or any contract of insurance, to extend the time for paying a premium, to bind the Company by making any promise, or by receiving any representation or information not contained in the application for this policy.

Assignments.—The Company declines to notice any assignment of this policy until the original assignment or a duplicate or certified copy thereof shall be filed in the Company's Home Office. The Company will not assume any responsibility for the validity of an assignment.

[On the margin of the policy are the words: " The receipt of the first payment of premium hereon is hereby acknowledged." , Secretary.]

(C). Form of Policy issued by The Mutual Benefit Life Insurance Company of Newark, New Jersey (endowment policy).

This Policy Witnesseth that THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, in consideration of the statements and agreements in the application for this Policy, which are hereby made a part of this contract, and of the sum of Five Hundred and Eighteen Dollars and Fifty Cents, to it in hand paid by John Jones, and of the Annual Premium of Five Hundred and Eighteen Dollars and Fifty Cents to be paid at or before twelve o'clock, M., on the First

day of October in every year until Twenty full years' Premiums shall have been paid, or until the death of the Insured, should that event sooner occur, Does Insure the life of John Jones, of Newark, in the County of Essex, State of New Jersey, in the amount of Ten Thousand dollars, payable to the said Insured, at its office in the City of Newark, New Jersey, on the First day of October, Nineteen Hundred and Nine, or should he die before that time, then to his executors, administrators or assigns, upon due and satisfactory proof of interest and of the death of the said Insured, deducting therefrom all indebtedness of the party to the Company, together with the balance, if any, of the then current year's Premium.

Provided, that in case the said Premiums shall not be paid on or before the several days hereinbefore mentioned for the payment thereof, at the office of the Company in the City of Newark, or to Agents when they produce receipts signed by the President or Treasurer, then, and in every such case, this Policy shall cease and determine, subject to the provisions of the Company's Nonforfeiture System as indorsed hereon, with accompanying table.

This Policy does not take effect until the first Premium shall have been actually paid; nor are Agents authorized to make, alter or discharge this or any other contract in relation to the matter of this insurance, or to waive any forfeiture hereof, or to grant permits, or to receive for the cash due for Premiums anything but cash. Any error made in understating the age of the Insured, will be adjusted by paying such amount as the Premiums paid would purchase at the table rate.

No assignment of this Policy shall take effect until written notice thereof shall be given to the Company.

This Policy, after two years, will be incontestable, except for fraud or non-payment of Premium.

In Witness Whereof, the said THE MUTUAL BENEFIT LIFE INSURANCE COMPANY has, by its President and Secretary, signed and delivered this Contract, at the City of Newark, in the State of New Jersey, this First day of October, one thousand eight hundred and eighty-nine.

, *President.*

, *Secretary.*

NONFORFEITURE PROVISIONS.

When after two full Annual Premiums shall have been paid on this Policy it shall cease or become void solely by the non-payment of any Premium when due, the entire net reserve value of the Policy and Dividend Additions, by the American Experience Mortality and interest at four per cent. yearly, less any indebtedness to the Company on this Policy, shall be applied by the Company as a Single Premium at the Company's rates published and in force at this date, either, *first*, to the purchase of non-participating term insurance for the full amount insured by this Policy, or, *second*, upon the written application by the owner of this Policy and the surrender thereof to the Company at Newark within three months from such non-payment of Premium, to the purchase of a non-participating Paid-up Policy payable at the time this Policy would be payable if continued in force. Both kinds of insurance aforesaid will be subject to

the same conditions, except as to payment of Premiums, as those of this Policy. No part, however, of such term insurance shall be due or payable unless satisfactory proofs of death be furnished to the Company within one year after death; and if death shall occur within three years after such non-payment of Premium, and during such term of insurance, there shall be deducted from the amount payable the sum of all the Premiums that would have become due on this Policy if it had continued in force. If the reserve be more than enough to purchase temporary insurance as aforesaid to the end of the endowment term, the excess shall be applied to the purchase of pure endowment insurance, payable at the end of the term if the Insured be then living.

After two full years' Premiums shall have been paid, the Company will, on surrender of this Policy fully receipted while in force or within three months from time of lapse, allow as a Cash Surrender Value for the same, a sum not less than the full reserve value of the Policy, exclusive of Dividend Additions, computed by the above-named standard, deducting therefrom any indebtedness to the Company on this Policy; and, at the end of the tenth policy year, or at the end of any succeeding five year period, if the Policy be then in force, and if it be surrendered fully receipted within thirty days from such times, the Company will increase the Guaranteed Cash Surrender Value by the entire reserve value of all existing Dividend Additions.

The following table shows the minimum value of the Policy under the several options granted by the Company:

1st Option.—Cash Surrender Value.

2d Option.—Amount that may be borrowed from the Company on the Policy.

3d Option.—Extended Insurance for full amount of Policy, and Cash Endowment (if any) payable at end of Policy term.

4th Option.—Paid-up Policy Value.

Number of Years' Premiums Paid.	Guaranteed Cash Surrender Value.	Company Will Loan.	In Case of Lapse of Policy. Extended Insurance. Years.	Days.	Cash Payable at End of Endowment, if party lives.	Paid-up Policy.
2	$ 644 10	$ 320	5	261	. . . .	$1,080
3	987 50	490	8	221	. . .	1,610
4	1,346 00	670	11	108	. . .	2,130
5	1,720 10	860	13	256	. . .	2,650
6	2,110 90	1,060	14	. .	$ 530	3,150
7	2,518 80	1,260	13	. .	1,390	3,660
8	2,944 90	1,470	12	. .	2,220	4,150
9	3,390 00	1,700	11	. .	3,010	4,630
10	3,855 10	1,930	10	. .	3,760	5,110
11	4,341 30	2,170	9	. .	4,480	5,580
12	4,850 00	2,430	8	. .	5,160	6,040
13	5,383 00	2,690	7	. .	5,810	6,500
14	5,942 00	2,970	6	. .	6,430	6,950
15	6,529 30	3,260	5	. .	7,010	7,390
16	7,147 50	3,570	4	. .	7,660	7,900
17	7,799 70	3,900	3	. .	8,280	8,420
18	8,489 40	4,240	2	. .	8,880	8,940
19	9,221 20	4,610	1	. .	9,450	9,470
20	10,000 00	5,000		. .	10,000	10,000

Future Dividends cannot be guaranteed; but on the basis of the Dividends payable this year, the first year's Dividend would add about $150.00 to the sum insured, with probable increased additions in subsequent years.

NOTE.—The first ten years' Dividends that may be declared upon this Policy will be allowed only on the "Addition" Plan.

The values of this Policy may, owing to Dividend Additions, be more than those above stated; but they cannot be less, provided there be no loan on the Policy requiring adjustment.

Loans not made for less than twenty dollars.

, *Mathematician.*

(D.) Form of (accident) policy issued by the Travelers' Insurance Company, of Hartford, Conn.

THE TRAVELERS' INSURANCE COMPANY, OF HARTFORD, CONN.

In Consideration of the Warranties in the Application for this Policy, And of Dollars, Does Hereby Insure , Of , County of , State of , under Classification (being a by occupation), for the term of Months, from noon of , 18 , in the sum of Dollars per Week, against loss of time not exceeding 26 consecutive weeks, resulting from bodily injuries effected during the term of this insurance, through External, Violent, and Accidental Means, which shall, independently of all other causes, immediately and wholly disable him from transacting any and every kind of business pertaining to his occupation above stated. Or if loss by severance of one entire hand or foot results from such injuries alone within ninety days, will pay Insured One-third the Principal Sum herein named, in lieu of said weekly indemnity, and on such payment, this Policy shall cease and be surrendered to said Company; or in event of loss by severance of two entire hands or feet, or one entire hand and one entire foot, or loss of entire sight of both eyes, solely through injuries aforesaid within ninety days, will pay Insured the Full Principal Sum aforesaid provided he survives said ninety days. Or if death results from such injuries alone within ninety days, Will pay Dollars to , if surviving; in event of prior death, to the legal representatives or assigns of Insured. *Provided*—

1. If Insured is injured in any occupation or exposure classed by this Company as more hazardous than that here given, his insurance shall be only for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard.

2. This policy shall not take effect unless the premium is paid previous to any accident under which claim is made; and the Company may cancel it at any time by refunding said premium, less a *pro rata* share for the time it has been in force.

3. The Company's total liability hereon in any policy year shall not exceed the principal sum hereby insured; therefore, in case of claim for full principal sum, any sums paid as indemnity within such policy year shall be deducted therefrom.

4. Immediate written notice, with full particulars and full name and address of insured, is to be given said Company at Hartford of any accident and injury for which claim is made. Unless affirmative proof of death, loss of limb or sight, or duration of disability, and of their being the proximate result of exter-

nal, violent, and accidental means, is so furnished within seven months from time of such accident, all claims based thereon shall be forfeited to the Company. No legal proceeding for recovery hereunder shall be brought within three months after receipt of proof at this office, nor at all unless begun within one year from date of alleged accident.

5. This insurance does not cover disappearances; nor suicide, sane or insane; nor injuries of which there is no visible mark on the body (the body itself in case of death not being deemed such mark); nor accident, nor death, nor loss of limb or sight, nor disability, resulting wholly or partly, directly or indirectly, from any of the following causes, or while so engaged or affected: Disease or bodily infirmity, hernia, fits, vertigo, sleep-walking; medical or surgical treatment except amputations necessitated solely by injuries and made within 90 days after accident; intoxication or narcotics; voluntary or involuntary taking of poison or contact with poisonous substances or inhaling of any gas or vapor; sunstroke or freezing; duelling or fighting, war or riot; intentional injuries (inflicted by the Insured or any other person); voluntary over-exertion; violating law; violating rules of a corporation; voluntary exposure to unnecessary danger; expeditions into wild or uncivilized countries; entering or trying to enter or leave a moving conveyance using steam as a motive power (except cable cars), riding in or on any such conveyance not provided for transportation of passengers, walking or being on a railway bridge or road-bed (railway employees excepted).

6. No claim shall be valid in excess of $10,000 with $50 weekly indemnity under Accident Policies, nor for indemnity in excess of money value of Insured's time. All premiums paid for such excess shall be returned, on demand, to Insured or his legal representatives.

7. Any medical adviser of the Company shall be allowed, as often as he requires, to examine the person or body of Insured in respect to alleged injury or cause of death.

8. Any claim hereunder shall be subject to proof of interest. A copy of any assignment shall be given within thirty days to the Company, which shall not be responsible for its validity. The Company may cancel this Policy at any time by refunding the unearned premium thereon. No agent has power to waive any condition of this Policy.

IN WITNESS WHEREOF, the TRAVELERS' INSURANCE COMPANY has caused this Policy to be signed by its President and Secretary, and countersigned by , Agent at , this day of , 18 .

, *Secretary.* , *President.*

, *Agent.*

II. Forms of Benefit Certificates.

(A.) Form of certificate issued by the Home Benefit Life and Accident Society of New York.

[From O'Brien *v.* Home Benefit Soc., 51 Hun, 495 (1889); which was affirmed in 117 N. Y. 310 (1889).]

No. 3,261. CERTIFICATE OF MEMBERSHIP. $2,000.

DIVISION B. AGE, 59.

Assessments, $5.50. Annual Dues, $5.00.

Annual dues are payable semi-annually, first of January and first of July in each year.

HOME BENEFIT LIFE AND ACCIDENT SOCIETY OF NEW YORK.

HOME OFFICE, 98 BROADWAY, N. Y.

This is to certify that P. O. of Street, City , State of , has paid the sum of twelve dollars, being the amount required on an application for membership, and is therefore accepted as a member of the Home Benefit Life and Accident Society of New York, in Division B, subject to the conditions and requirements of the amended by-laws, rules and regulations of the society and stipulations contained in the application for membership, and also to the conditions printed hereon. The membership entitles P. O., after the presentation of satisfactory proof of the affliction with disabling injury by accident of said member, subject to and in accordance with the charter, amended by-laws, rules and regulations of the society, and of the conditions printed hereon, to nine dollars weekly indemnity not exceeding three months; or, if said member shall have become permanently and totally disabled by accident for life, *i. e.*, so as to preclude the possibility of ever following any vocation; or, in the event of death, and upon satisfactory proof thereof, the membership entitles P. O., heirs or assigns, within 90 days after satisfactory proofs have been furnished to the officers of the society at the home office, to all of the amount realized from one assessment, not exceeding $2,000, payable at the home office of the society in New York, Provided said member continues to observe and comply with the conditions, requirements and stipulations above referred to, and to duly pay the semi-annual dues and assessments of said society during membership, otherwise the membership, with all moneys paid to the society, and all claims against the same in his behalf shall be forfeited, and this certificate shall be null and void, without any notice to said member or any action being taken by this society.

Given under the seal of the society, at New York, this of April, 18 .

[L. S.] J. T. W. K.,

President.

G. W. G.,

Secretary.

(B.) Form of certificate issued by "Knights of Honor."

[From Supreme Lodge Knights of Honor *v.* Johnson, 78 Ind. 110 (1881).]

No. . $2,000.00.

KNIGHTS OF HONOR; BENEFIT CERTIFICATE.

This certifies that Bro. B. F. J. has received the degree of Manhood; that he is a beneficiary member of the lodge in good standing; that in accordance with, and under the provisions of, the law governing the order, the sum of $2,000 will be paid by the Supreme Lodge, Knights of Honor of the World, as a benefit, upon due notice of his death and the surrender of this certificate, to such person or persons as he may, by will or entry on record book of this lodge, or on the face of this certificate, direct the same to be paid, provided he be in good standing when he dies.

Given under the seal of Victoria Lodge No. 22, Knights of Honor, at Indianapolis, Ind., this 25th day of April, 1877.

J. B. B., *Dictator.*
G. W. G., *Reporter.*

(C.) Form of certificate issued by "Knights of Maccabees."

[From Peet *v.* Great Camp Knights of Maccabees of the World, 47 Northwestern Rep. 119 (Supm. Ct. Mich. 1890).]

Incorporated by special act of State Legislature. Great Camp of the Knights of Maccabees of the World for the State of Michigan. First Class, No. 6,068. Rate of Assessment, Age, 20, Endowment Certificate, $1.00.

This certifies that Sir Knight Kosko R. Peet is a member of Ithaca Tent No. 128, located at Ithaca, Michigan, and that he is a beneficiary in good standing in the first class; that in accordance with, and under the provisions of, the laws governing the order, he is entitled to receive one assessment on the membership, but not over in amount one thousand dollars, as a benefit to himself, upon satisfactory proof of his death and the surrender of this certificate, provided he shall have in every particular complied with all the rules and regulations of the order and of the first class, and in case of permanent or total disability, or upon reaching the age of seventy years, he will be entitled to receive annually thereafter one-tenth of said endowment, as provided in the laws of the order.

In testimony whereof the Great Camp has caused the Great Commander and Great Record Keeper to attest and affix hereto the seal of the Great Camp of the Knights of the Maccabees of the World for Michigan, this eighth day of October, 1885.

[Seal of the Great Camp.]

ROWLAND CONNOR, *Gt. Com.*
N. S. BOYNTON, *Gt. R. K.*

Countersigned, sealed and delivered by the Sir Knight Commander and Sir Knight Record Keeper of Ithaca Tent, No. 128, K. O. T. M. O. T. W., this 12th day of October, 1885.

[Seal of Ithaca Camp.]

CHAS. J. PAINE, *Sir Kt. Com.*
B. K. TODD, *Sir Kt. R. K.*

(D.) Form of certificate issued by "Royal Arcanum."

[From Holland *v.* Taylor, 111 Ind. 121 (1887).]

ROYAL ARCANUM BENEFIT CERTIFICATE.

This certificate is issued to C. D. T., a member of Hoosier Council No. 394, Royal Arcanum, located at Indianapolis, Ind., upon evidence received from said council that he is a contributor to the widows' and orphans' benefit fund of this order, and upon condition that the statements made by him in his application for membership in said council, and the statements certified by him to the medical examiner, both of which are filed in the Supreme Secretary's office, be made a part of the contract; and upon condition that the said member complies in the future with the laws, rules and regulations now governing said council and fund, or that may hereafter be enacted by the Supreme Council to govern said council and fund. The conditions being complied with, the Supreme Council of the Royal Arcanum hereby promises and binds itself to pay, out of its widows' and orphans' benefit fund, to S. T. and M. V. M. (executors), for the benefit of A. L. T. (daughter), a sum not exceeding three thousand dollars, in accordance with, and under the provisions of, the laws governing the said fund, upon satisfactory evidence of the death of said member and upon the surrender of this certificate: Provided, that the said member is in good standing in this order at the time of his death; and provided, also, that this certificate shall not have been surrendered by said member and another certificate issued at his request in accordance with the laws of this order.

In witness whereof, the Supreme Council of the Royal Arcanum has hereunto affixed its seal, and caused this certificate to be signed by its Supreme Regent, and attested and recorded by its Supreme Secretary, at Boston, Massachusetts, this 25th day of August, 1884.

J. H. B., *Supreme Regent.*

Attest: W. O. R., *Supreme Secretary.*

[On the back of this certificate was this form:]

Form of change of beneficiary. Council , No. , R. A. To 18 . Supreme Secretary, S. C. R. A., I hereby surrender and return to the Supreme Council of the Royal Arcanum the written benefit certificate, No. , and direct that a new one be issued to me, payable to .

[Seal of sub-council.] [Member's signature.]

Attest: , *Secretary.*

III. Form of Application for Insurance (with Form of Medical Examiner's Report).

(A.) Form of application for insurance in the Massachusetts Mutual Life Insurance Company, of Springfield, Mass.

QUESTIONS TO BE ANSWERED BY THE PERSON WHOSE LIFE IS PROPOSED FOR INSURANCE.

1. What is your full name?	Give your place of birth.			And date of birth.			Age at next birthday.
	Town	County	State	Year	Month	Day	

2. Where is your residence? Town County State

3. Where have you resided [summer and winter] during the last ten years? | Are you married?

4. What is your profession or occupation? (State kind of business and duties definitely.) (Present) (Former)

5. Have you ever been insured in this Company? If so, state numbers of policies and amount.

6. A. Have you other life insurance?	B.—Names of Companies.	C.--Amounts.	D.—Kinds of Policies.	E.—Dates of Issue.
Ans. A.............		$		
B. If so, give names of Companies. C. Amounts. D. Kind of Policies. E. Date of issue.		$		
		$		
		$		

7. Has any proposal or application to insure your life ever been made to any Company or agent upon which a policy has not been issued, or is any now pending? If so, state full particulars.

8. Has any physician given an unfavorable opinion upon your life with reference to life insurance, formally or informally, with or without your making an application? If so, state particulars.

9. What amount of insuraunce is applied for? $........ What kind of a policy is desired? How do you wish to pay the premium?

10. To whom is the amount of the insurance to be paid in case of your death? Give full name, relationship and residence. In case of the prior death of the above beneficiary, to whom payable in case of your death?

(Endowments will be made payable to the insured at maturity, unless otherwise requested.)

Dated at....................................this..................day of ....

................18 . Witness:.................................... ....

THE MEDICAL EXAMINER WILL ASK THE FOLLOWING QUESTIONS, THE ANSWERS TO WHICH MUST BE IN HIS OWN HANDWRITING.

The examiner should also explain, as far as possible, all ambiguous or indefinite answers, such as "fair health," "not very strong," "over-work," "childbirth," "liver complaint," "dropsy," "change of life," "heavy cold," "accident," etc., etc.

11. Name in full, | Residence,

12. A. Do you use spirituous, malt, or other intoxicating liquors? If so, to what extent, average quantity each day?	A...................
B. Have you at any time used them to excess? [Give full particulars.]	B ....
C. Are you now, or have you ever been engaged in the manufacture or sale of beer, wine, or any other intoxicating drinks?	C....................
D. Have you ever used, or do you use, opium, morphia, or any other narcotic? To what extent do you use tobacco?	D........ ....

13. Has either of your parents, or any of their brothers or sisters, or any of your brothers or sisters, died of, or been afflicted with, consumption, insanity, gout, or any hereditary disease? [Give particulars.]

14. Which child of your mother are you in order of number?	If your mother is not living, what was your age at time of her death?	Which parent do you most resemble in appearance and constitution?

15.	Age if living.	Condition of Health.	Age at death.	Cause of death.	How long ill.	Previous Health.
Father,						
Mother,						
.........Brothers,						
....Sisters,						
Father's Father,						
Father's Mother,						
Mother's Father,						
Mother's Mother,						

16. Have you had any of the following diseases or symptoms?

Abscess, Apoplexy, Asthma, any severe Fever, any disease of the Lungs, any disease of the Heart, any disease of the Brain, any disease of the Liver, any disease of the Kidneys, any disease of the Stomach, any disease of the Bowels, any disease of the Urinary Organs, any disease of the Generative Organs, Bronchitis, Cancer or any Tumor, Delirium Tremens, Diphtheria, Dropsy, Enlarged Glands, Epilepsy, Eruptions or disease of the Skin, Fistula in Ano, Fits or Convulsions, Gout, Habitual Cough, Insanity, Lumps or Swellings, Open Sores, Paralysis, Piles, Pleurisy, Pneumonia, Rheumatism, Scrofula, Small Pox, Spinal Disease, Spitting or Raising of Blood, Sunstroke, Varicose Veins.

17. What injuries or diseases have you had during the last ten years? State their character, severity, dates and duration.

It is hereby agreed that the foregoing answers are true, and that no insurance shall be in force until the acceptance of this application by the Company, the delivery of the Policy to the insured or his agent, and the payment of the first premium as stated in the Policy.

Dated at....................................... ....

this........ ....day of..........................18 . ...

WITNESS: ....Medical Examiner. ....

(B.) Medical Examiner's Report accompanying above Application.

THIS BLANK MUST BE FILLED UP BY THE MEDICAL EXAMINER IN HIS OWN HANDWRITING.

1. Name,.........; residence,.........; height,..ft.,..in.; weight,....lbs.; girth of chest [under vest], deep expiration,.....in.; full inspiration,.....in.; girth of abdomen.....in.; figure, ...; does appearance indicate health and vigor?......; race,......; color,....... Do you personally know the party?....... Any relation of yours?....... Age.....

2. Has party's weight recently increased?......or diminished?....... If so, how much, and within what period?....... . (If under or over weight, give weights of father, and mother, and brothers, and sisters, at bottom of this report.)

3. Has the party ever had severe headaches, vertigo, fits, or any nervous or muscular trouble?

4. Is there a rupture? If so, what kind, and is it reducible or not, and is a truss worn?

5. Is there any cutaneous eruption on any part of the body, and if so, of what nature?

6. A Is the party subject to cough, expectoration, palpitation, or difficulty of breathing? | A
   B Has he ever been? | B

7. A Is the respiratory murmur clear and distinct over every part of both lungs? | A
   B Is the respiration full, easy, and regular? | B
   C Is there any indication of disease of the organs of respiration? | C
   D Number of respirations per minute. | D

8. A Is the action of the heart uniform, free, and steady? | A
   B Are its sounds and rhythm regular and normal? | B
   C Is there any indication of disease of the heart or blood vessels? | C

9. A State the rate and character of the pulse. | A
   B Does it intermit, and is it irregular or unsteady? | B

10. A Is there any disease or disorder of the stomach or abdominal organs? | A
    B Is there any indication of disease of the urinary organs? | B

11. Chemical examination of urine to be made in all cases.

Color.........	Albumen...... Sugar......
Reaction..................	Nature and amount of Sediment....................
Sp. Gravity....	....
If over 1.030 or under 1.012 examine other specimens.	

Microscopical examination to be made when Medical Examiner deems it advisable, or home office calls for it.

Why is microscopical examination made? Answer at foot of Report.

Casts,...; Pus,...; Blood,...;
Crystals,....... ....;
Other Elements............
....

12. A Has party ever had any severe illness or injury, or undergone any surgical operation? | A
    B Is there any indication that the party is not now entirely well? | B
    C Is the party deaf, dumb, blind, lame, or maimed in any way? | C

13. Is there any indication which leads you to suppose that the party has led or now leads other than a temperate life; or that present or past habits are, or have been, faulty in any respect?

14. Is there *apparent* in the person examined, any predisposition, either hereditary or acquired, to any local or constitutional disease?

15. Is there evidence of successful vaccination?

16. Has the applicant the appearance of an overworked person?

17. ADDITIONAL QUESTIONS TO BE ANSWERED IN CASE THE APPLICANT IS A WOMAN.

A. Is she pregnant?..........................

....

B. Is her menstruation regular and normal?..

....

C. Has she passed the change of life?........

....

D. Has she ever miscarried?..................

....

E. How many children has she had?.........

The age of the last?.......................

F. Is there any evidence of uterine disease?

....

G. What is her husband's occupation?.......

....

H. Date of her last marriage?...............

....

18. A Do you find the party in perfect health, and safely insurable?	A
B If safely insurable, do you consider the party a FIRST-CLASS RISK, A GOOD RISK, or only A FAIR RISK?	B
C Do you recommend that the policy be issued? [YES or NO.]	C

I have examined the applicant in private, and witnessed his [or her] signature herein.

.................................., M. D., *Medical Examiner.*

Examined at................................, this...... ....day of......................, 18....

REMARKS:

IV. Form of Proof of Death.

Form of Proof of Death employed by the Connecticut Mutual Life Insurance Company of Hartford, Conn.

No. 1. Claimant's Certificate.

Claimant's name and residence?

Number, date and amount of policy. No. , date , $.

In what capacity, or by what title, do you make the claim?

Name of deceased in full?

How many years had you known deceased?

Residence of deceased since above policy was issued?

The several occupations of deceased since the above policy was issued?

Place and date of birth of deceased ?

Place and date of death ?

a. Remote cause of death. *a.*

b. When did health of deceased first begin to be affected ? *b.*

c. Immediate cause of death ? *c.*

d. Duration of last illness ? *d.*

e. Give every particular in relation thereto within your knowledge ? *e.*

Name and residence of every physician who attended or prescribed for deceased during the last year prior to death, or since he became out of health ?

Did the deceased violate any condition of the above-mentioned policy in respect to residence, travel, occupation, use of spirituous liquors, dueling, suicide, violation of law, or had he been convicted of felony ?

NO. 2. ATTENDING PHYSICIAN'S CERTIFICATE.—ALL ANSWERS MUST BE IN THE PHYSICIAN'S OWN HANDWRITING.

How long have you practiced as a physician, and where did you receive your medical education ?

Name of deceased ?

Place and date of death ?

How long have you known deceased ?

How long have you been h   usual medical adviser ?

Since you have known deceased,

a. What has been h   several occupations, and *a.*

b. H   places of residence ? *b.*

Duration of last illness ?

Date of your first visit, or prescription, in last illness ?

Date of last visit ?

a. State the remote cause of death; if from disease, give the predisposing cause, the first appearance of its symptoms, its history, and the symptoms present during its progress ? *a.*

b. State the immediate cause of death ? *b.*

c. If from any cause other than disease, state the medical and other facts connected therewith ? *c.*

d. Was a *Post-Mortem* examination made; by whom, and with what results ? *d.*

Had deceased any other disease, acute or chronic, or had h   ever had any injury or infirmity ?

Was there anything in h   habits, or mode of life, predisposing h   to disease ?

Did deceased use spirituous liquors?

a. To what extent?
b. With what effect?

State the apparent age of deceased?

No. 3. FRIEND'S CERTIFICATE.

Name of deceased, in full?

Residence?

Occupation?

Date and place of death?

Cause of death?

Was the deceased insured in the Connecticut Mutual Life Insurance Co.?

Number, date, and amount of policy? No. , date

Do you know the deceased to be the person insured by the above-named policy, by the name above given?

Have you any interest in the above policy?

No. 4. UNDERTAKER'S CERTIFICATE.

Name of deceased?

Residence and occupation?

Date of birth?

Date and place of death?

Did you inter the deceased, when, and where?

Did you know the body interred by you to be that of the person named by you as the deceased?

Your name, residence, and post-office address?

INSTRUCTIONS.

No. 1. Claimant's Certificate is to be executed by the person legally entitled to receive the money, who must state by what title he or she makes the claim, whether as the beneficiary named in the policy, or as executor or administrator of a deceased beneficiary, or as guardian, or other legal representative of a minor, or as a trustee or as assignee. In case of assignment, a sworn statement of interest must be made, and a copy of the assignment furnished. Executors, administrators, and guardians must send certified copies of their appointment and certificate of qualifications. Trustees, unless named in the policy, must exhibit their authority.

No. 2. Attending Physician's Certificate is to be executed by the physician attending the deceased in his or her last illness. If more than one physician were employed, the certificate of each must be obtained. The entire certificate must be in the handwriting of the physician

No. 3. Friend's Certificate is to be executed by some person intimately acquainted with the deceased, cognizant of his or her death, and not interested in the claim.

No. 4. Undertaker's Certificate is to be executed by the undertaker or sexton who interred the deceased. If necessary, it may, with slight change, be executed instead by the clergyman who officiated at the interment.

Every question must be distinctly and fully answered; and the Company reserves the right to ask any further questions necessary under the circumstances of any particular case.

Each certificate must be sworn to before an officer duly authorized to administer oaths; and his authority, and the genuineness of his signature, must be attested by the Clerk of a Court of Record.

If the oath be administered in a foreign country, the official character of the person administering the same, or of the clerk or other officer of a court certifying thereto, must be authenticated by a Consul or Minister of the United States residing in such foreign country.

[Forms of such oaths are appended to the different certificates.]

V. Form of Pleading employed by Plaintiff in Action at Law on the Contract.

[See generally as to pleadings, § 123.

The following is the form of complaint, a recovery upon which was sustained in Paul *v.* Travelers' Co., 112 N. Y. 472 (1889). The portions in brackets were employed in view of the special provisions of the *accident* policy on which the action was brought. The form is one that may readily be adapted for the purpose of any ordinary action at law on a *policy*.

As to additional allegations required, according to the doctrine upheld by some courts, in case of an action on a *benefit certificate*, see § 124.]

I. That the said defendant is a corporation created by and existing under the laws of the State of Connecticut, and authorized to do an insurance business in the State of New York.[1]

II. That on or about the 3d day of December, 1884, one M. L. P. died intestate, being at that time an inhabitant of county, and that on Nov. 24, 1885, the plaintiff was duly appointed by the Surrogate of county, administrator of the goods, chattels and credits of the said M. L. P., deceased.[2]

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[1] In case of a foreign corporation, it is perhaps well to add this allegation of authority to do business, especially where, by the statutes of the State, the right of foreign insurance corporations to transact business therein depends on the performance of certain conditions.

[2] Of course an allegation of this character is necessary only in an action by an administrator (or executor).

In case of an action by an executor, the following allegations may be used instead

III. That on or about Nov. 22, 1884, the defendant, for a good and valuable consideration, executed and delivered to the said M. L. P.,[1] a policy or certificate of insurance, a copy of which is hereto annexed and made a part of this complaint, wherein and whereby it promised and agreed to pay to the legal representatives[2] of the said M. L. P., within ninety days after proof of the death of the said P., the sum of $3,000 [in case such death occurred within 12 days from the date of the said policy, and was the result of external, violent and accidental means].[3]

IV. That, as the plaintiff is informed and believes, the said M. L. P. duly fulfilled and performed all the conditions and stipulations in said policy contained to be on his part performed,[4] and that the said M. L. P. was, at the time of his death, insured by the said company, as aforesaid.

V. That on or about Dec. 3, 1884, and during the continuance of such policy, the said M. L. P. died, by reason of one of the causes not excepted in said policy; that the proofs of the death of the said P., and of the manner thereof, were duly presented and furnished to said defendant more than ninety

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of those used in the form given: "That on or about the day of , 18 , one M. L. P. died, leaving a will, by which the plaintiff was appointed the sole executor thereof [*or*, this plaintiff and C. D. were appointed executors thereof], and that on the day of , 18 , said will was duly proved and admitted to probate in the office of the Surrogate of county, and letters testamentary thereupon were thereafter duly issued and granted to the plaintiff, as sole executor, by the Surrogate of said County; and this plaintiff thereupon duly qualified as such executor and entered upon the discharge of the duties of his office."

[1] Or, if the contract was made with the plaintiff, the allegation should be, "executed and delivered to the plaintiff."

[2] As to effect of this provision, see § 67.

Of course, if the contract was to pay to the plaintiff, the allegation should be accordingly. See note 1, above.

Ordinarily, where the beneficiary is another than the insured, an insurable interest must be alleged. See § 58. Thus, "that the plaintiff, at the time of effecting such insurance, was the wife of the said M. L. P. [*or*, was a creditor of the said M. L. P., to the amount of $], and as such had a valuable interest in the life of the said M. L. P.

If the plaintiff derives his right by assignment, such assignment must be alleged. Thus, "that on the day of , 18 , the said M. L. P. [with the written consent of the defendant, by its agent duly indorsed on the policy, *or, otherwise state such consent as required by the terms of the contract*] duly assigned said policy of insurance to this plaintiff." And, according to the doctrine prevailing in some jurisdictions, an insurable interest in the assignee must be alleged. See above.

[3] As to effect of this provision, see § 53.

[4] It seems ordinarily better to allege such performance on the part of the *plaintiff*, as well as of the insured.

This general allegation of performance is made sufficient by statute in some jurisdictions, but would not necessarily be sufficient at common law. See § 123.

days before the commencement of this action;[1] that no part of said insurance has been paid as provided in and by said policy of insurance, although the defendant has been duly requested to pay the same;[2] [that the death of the said P. resulted from violent, external and accidental means] and that said sum of $3,000, by reason of the premises, became due and owing to the plaintiff on March 1, 1885.

Wherefore plaintiff demands judgment against the defendant in the sum of , with interest thereon from , besides the costs of this action.

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[1] The allegation of the lapse of the ninety days is essential even under the statutes referred to in note 4, p. 278, such lapse not being a condition performed by the plaintiff.

[2] The allegation of request seems unnecessary. See p. 232.

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